

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANTS AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT *Court of Appeals
For the
District of Columbia Circuit*

No. 16,482

FILED

AUG 23 1961

STANLEY COMPANY OF AMERICA, INC.
a corporation,

and

EARLE RESTAURANT, INC.,
a corporation,

Appellants,

v.

WALTER N. TOBRINER,
FREDERICK J. CLARKE,
JOHN B. DUNCAN,
District of Columbia Commissioners,

and

J. J. ILGENFRITZ,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

1. Did "any portion of " Appellants' property, located at 503 Thirteenth Street, N. W., "front or abut upon" Pennsylvania Avenue within the meaning of the Shipstead-Luce Act, May 16, 1930, 46 Stat. 366, U.S.C. Title 40, § 121, (D.C. Code, Title 5, § 410, 1951 Edition), where no part of Appellants' property touches Pennsylvania Avenue, but touches only Thirteenth Street and "E" Street?
2. Did the United States District Court for the District of Columbia err as a matter of law in dismissing the Complaint on the basis that Appellants' application for repairs or alterations was subject to the Fine Arts Commission approval, where the application admittedly met all requirements of District of Columbia Law, and where no portion of said property "fronts or abuts upon" Pennsylvania Avenue within the plain meaning of the above statute?

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UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 16,482

STANLEY COMPANY OF AMERICA, INC., et al.,
Appellants,

v.

WALTER N. TOBRINER, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

Appellants instituted this action in the United States District Court for the District of Columbia against Appellees, Commissioners of the District of Columbia, and others, to compel the issuance of a permit to make repairs or alterations on their property (J.A. 3).

The amount in controversy exceeds the sum of Three Thousand Dollars (\$3,000.00) (J.A. 3).

This is an appeal from a final judgment of the United States District Court for the District of Columbia granting Appellees' Motion for Summary Judgment and Denying Appellants' Counter-Motion for Summary Judgment, and entering final judgment for the defendants (J.A. 27).

This Court has jurisdiction under Title 28, §1291, U.S.C.

STATEMENT OF THE CASE

Appellants, on July 21, 1959, filed with the Government, through the Department of Licenses and Inspections, an application for the making of repairs or alterations to their property in the District of Columbia located at 503 Thirteenth Street, N. W. (the office building being 501 Thirteenth Street, N. W.) (J.A.3,4). After the application had been processed by the proper departments of the District of Columbia, it was approved as complying with all applicable District of Columbia regulations (J.A. 13). Thereafter, the Commissioners of the District of Columbia, through their agents, referred the application to the Commission of Fine Arts. The Commission of Fine Arts disapproved this Application (J.A. 4, 13). Based solely upon this disapproval, the Appellants' application was denied by the District of Columbia Government (J.A. 4, 13, 14).

Thereafter, Appellants instituted an action in the United States District Court for the District of Columbia on August 30, 1960, (amended Complaint on September 12, 1960), to require the issuance of the necessary permit to make repairs and remodel the existing building in question (J.A. 3). The basis of this action was that since the Appellants' property was not subject to the jurisdiction of the Commission of Fine Arts, the application should not have been referred to it by the Government of the District of Columbia (J.A. 4).

Appellees thereafter filed a Motion to Dismiss, or, in the Alternative, for Summary Judgment, on December 15, 1960 (J.A. 6). Appellants filed a Counter-Motion for Summary Judgment on January 24, 1961, (J.A. 17)

contending that under the Shipstead-Luce Act of May 16, 1930, 46 Stat. 366, U.S.C. Title 40, §121, the Fine Arts Commission had jurisdiction of Appellants' property if, and only if, "any portion of" said property "fronts or abuts upon" Pennsylvania Avenue. The exhibits which were used in support of both Motions indicate that no part of Appellants' property touches or borders on Pennsylvania Avenue, and that Appellants' property was separated from Pennsylvania Avenue, its nearest point to Pennsylvania Avenue being approximately 250 feet (J.A. 11-12). (Scale applies to full size plat in record).

On March 29, 1961, the Motions came on for hearing in the United States District Court for the District of Columbia, and both Motions were heard together by the Court.

On May 17, 1961, the District Court filed a Memorandum Opinion (J.A. 19).

The Motion of the defendants for Summary Judgment was granted, and the Counter-Motion of the plaintiffs for Summary Judgment was denied, and final judgment for the defendants was entered on May 24, 1961 (J.A. 27).

On June 6, 1961, Appellants noted this appeal (J.A. 27).

STATUTES INVOLVED

Act of May 16, 1930, 46 Stat. 366, U.S.C., Title 40, §121. (Shipstead-Luce Act, also appears as Title 5, §410, 411, D.C. Code, 1951 Edition):

§410, D.C. Code:

"In view of the provisions of the Constitution respecting the establishment of the seat of the national government, the duties it imposed upon Congress in connection therewith, and the solicitude shown and the efforts exerted by President Washington in the planning and development of the capital city, it is declared that such development should proceed along the lines of good order, good taste, and with due regard to the public interests involved, and a reasonable degree of control should be exercised over the architecture of private or semi-public buildings adjacent to public buildings and grounds of major importance.

To this end, when application is made for permit for the erection or alteration of any building, any portion of which is to front or abut upon the grounds of the Capitol, the grounds of the White House, the portion of Pennsylvania Avenue extending from the Capitol to the White House, Lafayette Park, Rock Creek Park, the Zoological Park, the Rock Creek and Potomac Parkway, Potomac Park, the Mall Park System and public buildings adjacent thereto, or abutting upon any street bordering any of said grounds or parks, the plans therefor, so far as they relate to height and appearance, color, and texture of the materials of exterior construction, shall be submitted by the Commissioners of the District of Columbia to the Commission of Fine Arts; and the said Commission shall report promptly to said Commissioners its recommendations, including such changes, if any, as in its judgment are necessary to prevent reasonably avoidable impairment of the public values belonging to such public building or park; and such commissioners shall take such action as shall, in their judgment, effect reasonable compliance with such recommendation: PROVIDED, That if the said Commission of Fine Arts fails to report its approval or disapproval of such plans within thirty days, its approval thereof shall be assumed and a permit may be issued.

§411, D.C. Code:

"Said Commissioners of the District of Columbia, in consultation with the National Capital Park and Planning Commission, shall prepare plats defining the areas within which application for building permits shall be submitted to the Commission of Fine Arts, for its recommendations."

STATEMENT OF POINTS

1. The District Court erred as a matter of law in holding that Appellants' property is within the terms of the Shipstead-Luce Act of May 16, 1930, 46 Stat. 366, U.S.C. Title 40, §121, (§5-410, 411 D.C. Code, 1951 Edition), and in holding that Appellants' property is within the jurisdiction of the Fine Arts Commission.

2. The building in question, Appellants' property, does not "front or abut upon" Pennsylvania Avenue under the terms of the above statute.

3. Where the Appellants' application to make repairs or alterations met all requirements of District of Columbia Law, a permit should have issued, and Appellants' application should not have been submitted to the Fine Arts Commission.

4. The District Court ignored the plain meaning of the statute, and the construction of the statute in question by the District Court produces a vague, unreasonable and discriminatory result and destroys the standard expressed in the Act.

5. The Court erred as a matter of law in entering judgment for the Appellees since Appellants were clearly entitled to the relief sought in the Complaint.

SUMMARY OF ARGUMENT

A Statute should be given its plain, ordinary, common meaning. The phrase "front or abut upon" as used in U.S.C. Title 40, §121, means property which touches upon, or is in contact with, the street in question, either with its sides, or with its front, and does not include property which has other property intervening between it and the street in question.

Where Appellants' property does not touch the boundary line of Pennsylvania Avenue, and has other property intervening, it cannot be said to "front or abut upon" Pennsylvania Avenue within the meaning of the above-mentioned Act.

Since no portion of Appellants' property "fronts or abuts upon" Pennsylvania Avenue, the application for a permit to make repairs or alterations was not subject to approval of the Fine Arts Commission under the Act in question. Therefore, where the application admittedly complies in all respects with applicable District of Columbia Law, Appellants are entitled to the issuance of a permit to make repairs and alterations on their property.

The construction adopted by the District Court departs from widely accepted, and oft repeated, interpretation of the phrase "front or abut upon". This construction given by the District Court destroyed the standard in the Act, which standard had set forth precisely the scope and coverage of the Act so that the Statute, as drawn, indicated the property to be regulated as precisely as if set by metes and bounds.

This construction of a plain and unambiguous statute by the District Court created an unreasonable and discriminatory result.

ARGUMENT

I

APPELLANTS' BUILDING DOES NOT "FRONT OR ABUT UPON" PENNSYLVANIA AVENUE WITHIN THE MEANING OF THE SHIPSTEAD-LUCE ACT OF MAY 16, 1930, 46 Stat. 366, U.S.C. Title 40, §121.

Located as it is at 503 Thirteenth Street, N. W., Appellants' building does not touch or border on Pennsylvania Avenue (J.A. 11-12). Intervening between the building in question and Pennsylvania Avenue is "E" Street, across which lies the Pennsylvania Building, a private office building, which covers an entire block along Thirteenth Street south to Pennsylvania Avenue. To the southwest lies the interesection of Thirteenth and "E" Streets, N. W., across which is Pulaski Park (J.A. 11-12). (Pulaski Park is not mentioned in the Act.) To the west of the Building in question lies Thirteenth Street, N. W., across which are private buildings.

It thus appears that Pennsylvania Avenue, which lies to the south and southwest, is completely separated from Appellants' property by other intervening property. Appellants' property is approximately Two Hundred and Fifty feet (250) from Pennsylvania Avenue at the nearest point (J.A. 11-12).

The phrase - "front or abut upon" - or similar phrases, such as "fronting and abutting", has been the subject of interpretation by numerous courts. While the cases seem to differ on whether "fronts" is interchangeable with "abuts", they seem to be uniform in holding that property which fronts on a street is like abutting property, in that there is no intervening property between it and the street.

Those Courts which have held that "fronting" is not interchangeable with "abutting" indicate their view that the difference lies in the fact that "fronting" indicates the front part of the building in slight contrast to the "side" of the building.

The Case of Rombauer v. Compton Heights Christian Church, 328 Mo. 1, 40 S.W. 2d 545, involved certain restrictive covenants. The Court gives a thorough and accurate analysis of the meaning of "fronting", and "abutting". A diagram appears in the opinion. The opinion clearly shows:

1. "Front" ordinarily distinguishes from "side".
2. "But very often 'fronting' signifies abutting, adjoining, or bordering upon, depending largely on the context."

If we apply the second usage above to the case at bar, we conclude that "fronts" or "abuts" are interchangeable. If we apply the first usage (slightly disjunctive) we conclude that "fronts" or "abuts" upon both mean touches, yet "fronts" indicates that the front side touches. Either usage supports precisely Appellants' position that the Act of Congress in the case at bar applies only to property which touches on Pennsylvania Avenue, either with its front, or any side or rear. This, it does not do.

Barniak v. Grossman, (1956) 141 W.Va. 760, 93 S.E. 2d 49, is an excellent example. That was a case in which plaintiff sued for injuries on snow and ice which the ordinance required to be removed from sidewalks fronting the premises. Plaintiff, injured on the sidewalk on the

side of the building, argued that "fronting" had the meaning of or was interchangeable with "abutting".

Said the Court:

"...As hereinabove indicated, the ordinance makes it the duty of a tenant in a building to remove and clear ice and snow from sidewalks fronting their premises within a specified time after snow falls. The defendant Grossman is the tenant of a part of the building and the front entrance to his place of business is on Jefferson Street, extending lengthwise on Meredith Street. The plaintiff suffered her injuries from a fall caused by ice on the sidewalk on Meredith Street...

"...But bearing in mind the strict construction of the ordinance here considered, we are of opinion and so hold that the language of the ordinance requires tenants whose premises front on streets to clear away the snow and ice in front of their premises and not on the side or lengthwise dimension."

II

THE LANGUAGE OF THE ACT IS PLAIN AND UNAMBIGUOUS

The phrase "fronts or abuts upon" seems to be a clear group of words, used particularly with reference to land.

The word "fronts" is the word which seems to be urged by Appellees as the source of their power to go beyond the physical lines of Pennsylvania Avenue. Assuming that there was any doubt about the meaning of the word "fronts", then surely this doubt is overcome by the use of the preposition upon. The word upon links the verb fronts to the object, Pennsylvania Avenue. Congress said upon Pennsylvania Avenue.

Appellees argued in the District Court that the meaning intended was faces, as the house "fronts toward the east." Surely Congress could have capably said this, if so intended. It did not, but said something entirely different. To "face toward the east" is something entirely different and more general than to front upon a given named street.

Webster's New Twentieth Century Dictionary of the English Language, Unabridged, 2nd Ed. 1960 says:

"upon, prep. - on (in various senses) or up and on: used generally as an equivalent of on, ..." and

"on, prep...

1. Upon, in a position above but in contact with,..."

The word fronts has a common ordinary usage in real estate matters as "front-foot", or "front age"; also in assessment matters for street improvements, in restrictive covenants, zoning ordinances, etc.

It was adopted from Old French and seems to have continued a similar usage in English.

A typical English use is:

"Philip's dwelling fronted on the street."
1864 Tennyson, Enoch Arden.

The common usage indicates too that one would not ordinarily describe Appellants' property as fronting upon Pennsylvania Avenue. Since it fronts upon 13th Street or "E" Street, it would not be said to front upon another street that is some distance away and separated completely.

In Crane v. French, 1892, 50 Mo. App. 367, 369, where the lots were separated from a city street by a five foot strip, it was held that the lots were not "fronting" on the street within the meaning of the Kansas City Charter of 1875, and therefore were not subject to the assessment. A plat is shown in the opinion. Said the Court:

"Neither are we permitted, under the plea of construction, to enlarge or vary the plain meaning of this statute."

In Village of Bannockburn v. County of Lake, 17 Ill. 2d 155, 160 N.E. 2d 773 (1959) a county zoning act provided for written protest against zoning amendment by the owners of twenty (20) percent of

frontage directly opposite frontage proposed to be altered. Said the Court:

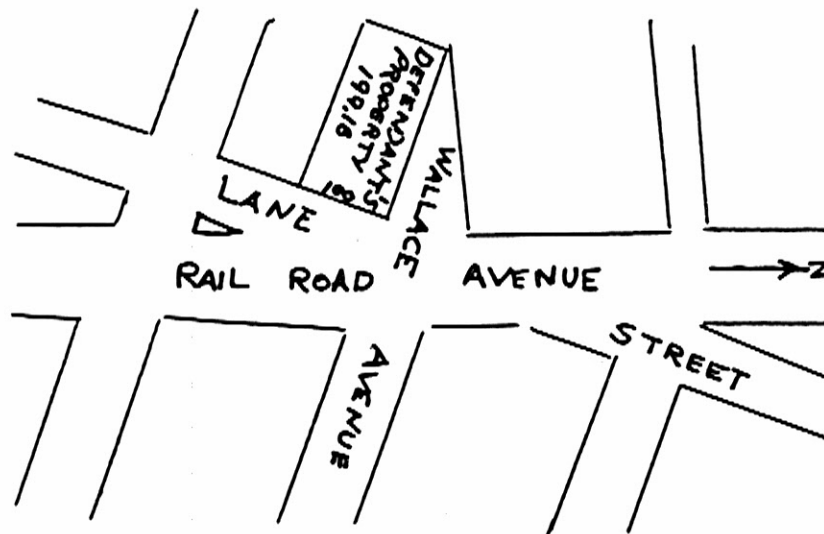
"In reading the language of the statute here, we find no need whatsoever for construction, interpretation or labored effort to ascertain the legislative intention. In this statute there is neither ambiguity nor room for construction. It seems to us abundantly clear that the legislature expressed its intention in clear and unmistakeable terms and the only function of the Court under such circumstances is to declare and enforce the law as enacted by the legislature. Belfield v. Coop, 8 Ill. 2d 293, 134 N.E. 2d 249, 58 A.L.R. 2d 1008. The word 'frontage' had a common, ordinary meaning and, obviously, that meaning was intended in the statute here under construction. 'Frontage' means that part of the parcel sought to be rezoned that gives access frontage on a roadway, alley or other public way. Property that is adjacent and contiguous to a stream, highway or road may be said to have frontage thereon. There is no indication to be found in the statute that any meaning other than the usual and customary meaning of the word was intended. We, thus, must use the definition above set forth, which is certainly commonly accepted. See Standard Oil Co. of Indiana v. Kamradt, 319 Ill. 51, 149 N.E. 538."

"Fronting upon a street means touching the boundary line of the street." Roach v. Soles, (D.C. Cal.) 1954, 120 F. Supp. 400, 404 (insurance contract).

"The words 'fronting' and 'adjoining' have been held synonymous. Meir v. City of St. Louis, 180 No. 391, 79 S.W. 955. The phrase referring to lots 'fronting upon a street' means the lots touching the boundary line of the street." (Emphasis supplied). Carr v. Kingsbury, 1931, 111 Cal. App. 165, 170, 295 P. 586, 588 (Statutory construction holding fronting to mean "touching" in Leasing Act regarding minerals in state lands.)

"Fronting on a street" and "fronting on the improvement" as used in an ordinance, have "reference to the boundary line between the lot and the street..." Flynn, et al. v. Chiappari, et al., 215 P. 682, 686, 191 Cal. 193 (1923); hence, the Court found that a lot did not front or abut upon a street where there was part of another street between the lot line and the line of the street to be improved. The Court's opinion

contained a diagram which is reproduced immediately following, showing defendant's property, and the street in question, Railroad Avenue, and the intervening street, Lane Street.



In *City of Wilburton v. McConnell*, 249 P. 708, 710, 119 Okla. 242, the Court said:

"By the terms 'fronting and abutting' as used in the statutes, is meant that between which and the improvement there is no intervening land."

Property which is fronting upon a street, is "property which has its principal exit to and entrance from that street." Collier's Estate v. Western Paving & Supply, 79 S.W. 947, 951, 180 Mo. 362, 378. (Case indicates that as used in a statute, "fronting" and "adjoining" distinguished between the "front" and "sides" of lots.)

In any event, the above case, and the other cases seem agreed that fronting means touching, or bordering.

"*Alker v. Collins*, 64 A. 2d 370, 2 N.J. Supp. 11, Appellate Div. Part B. A zoning ordinance required set-back of

buildings within the same 'block front'. Held:

' "Block-front" as used in this ordinance includes only the property that is located along and fronts on the particular street.'

"Daly v. Look, 267 S.W. 2d 77 (Ky. 1954). In a statute assessing the cost of the improvement against the abutting property according to its 'front footage' quoted term 'merely means the linear number of feet the property abuts on the improvement'."

"Fronting or bordering on" as used in Act March 22, 1895, Sec. 8, P.L.P 424, requiring a petition for review of an improvement assessment to be signed by the owner of at least two-thirds either in lineal feet or in the area of the lands and real estate "fronting or bordering on" the road or section of the road to be improved, means adjoining at some point the road or section of road involved. Erisman v. Board of Chosen Freeholders of Burlington County, 45 A. 998, 999, 64 N.J.L. 516.

Restriction in a deed providing that no part of foundation of any building constructed on lot shall be within 25 feet of street line upon which said lot "fronts" applies to narrower width of lot abutting on a street and not to both sides of streets on which corner lot abutted. Rhinehart v. Leitch, 140 A. 763, 764, 107 Conn. 400.

"A store operated in a basement which extended under the sidewalk and out to the curb of a street, from which an entrance was made to the store, 'fronts' on that street within the meaning of a provision in a lease giving the lessee the exclusive right to sell cigars and tobacco in that part of the building 'fronting' on such street." 32 American Jurisprudence, P. 145, L & T Sec. 145.

The Court of Appeals for the District of Columbia has employed the term "fronts on" in speaking of property sought to be assessed on a frontage basis pursuant to Act of Congress. Crosby v. Moebs, 61 App. D.C. 42, 57 F. (2d) 408, and see Philadelphia B & W RR v. Hazen, 116 F. (2d) 543, 73 App. D. C. 37.

In Johnson v. Rudolph, 57 App. D.C. 29, 16 F. (2d) 525, this Court employs the term "fronts", "frontage" and "front foot". A plat is contained

at page 30 of 57 App. D.C. indicating the properties in question. It seems clear from the opinion that the Court assumes the same meaning uniformly held by other authorities and urged herein by Appellants.

"Fronting and abutting" appears as one phrase in Black's Law Dictionary, 4th Edition. The definition says: "Very often, 'fronting' signifies abutting, adjoining, or bordering on, depending largely on the context". Also, in the same definition: "As used in statutes relating to assessment for improvements, property between which and the improvements there is no intervening land."

"Frontage" is defined in Black's Law Dictionary 4th Edition as: "Frontage denotes line of property on street."

"Fronting and abutting" appears also as one phrase in Law Dictionary by Ballentine: "Fronting and abutting property, as the term is frequently used in street improvement statutes means that property between which and the improvement there is no intervening land."

The "language is plain and unambiguous. What the government asks is not a construction of a statute, but in effect, an enlargement of it by the Court, so that what was omitted, presumably by inadvertance, may be included within its scope. To supply omissions transcends the judicial function." Iselin v. United States, 270 U.S. 245, 46 S.Ct. 248.

III

THE CONSTRUCTION OF THE ACT BY THE DISTRICT COURT PRODUCES AN UNREASONABLE AND DISCRIMINATORY RESULT AND DESTROYS THE STANDARD SET UP BY CONGRESS

The Opinion of the District Court relies heavily on the word "adjacent" which appears in the preamble of the statute (J.A. 19). The word is no part of the directive of Congress. Congress said "fronts or abuts upon" Pennsylvania Avenue.

Nor does there seem to be any validity in relying on the word adjacent. If, as the District Court said, it means "lying near, close or contiguous, neighboring, bordering on", then the mere fact that adjacent does not neces-

sarily mean touching or in actual contact would not seem to be probative in view of the plain words of the Act.

It should be noted that the word adjacent was used only with reference to "public buildings and grounds", not to any street. Hence, Congress, to protect "public buildings and grounds" subjected to regulation certain expressly mentioned property, among which was that which "fronts or abuts" upon Pennsylvania Avenue.

If, as the District Court stated, the preamble use of "adjacent" was controlling, and this was a general and loose usage, then does it not seem to be a strange use of language for Congress to say "any portion of which is to front or abut upon" when speaking of the buildings to be regulated? The terms "any portion of which" imply an exact or precise usage. Hence, if the loose usage applied by the District Court were intended, so that property situated an unknown distance from Pennsylvania Avenue could be regulated it would seem that the use of the terms "any portion" would be inappropriate, as being too precise. Certainly Congress did not intend to release a loose and ill-defined engine of regulation roughly down the path of Pennsylvania Avenue with no notice as to who is covered by the Act.

Congress specifically and plainly said that "when application is made for the erection or alteration of any building, any portion of which is to front or abut upon . . ., the portion of Pennsylvania Avenue extending from the Capitol to the White House . . .". These words gave the statute a precise measure or standard, notifying the world exactly what property was covered by the Act. That property could be measured with a ruler.

"Greater particularity could not have been achieved if the area had been described by metes and bounds." Philadelphia, B. & W. R.R. v. Hazen, 73 App. D.C. 37, 41, 116 F.2d 542 (employing: Abutting, frontage, front-foot, and adjacent).

The District Court also took the position that "face" "as the house fronts toward the east" was the proper interpretation (J.A. 23). Of course, Congress did not say this. As previously stated, the Act does not say toward any direction but upon a specific street, namely, Pennsylvania Avenue.

The District Court's Memorandum Opinion also indicated that it adopted defendant's interpretation of the word "front" (J.A. 24). The defendant's interpretation was that the word "front" included within the Shipstead-Luce area "all property which abutted Pennsylvania Avenue as well as all property along Pennsylvania Avenue that was so situated that there was an unobstructed view of it from Pennsylvania Avenue." (J.A. 24).

Appellants respectfully submit that this interpretation by Appellees and by the District Court creates an absurd result and so destroys the standard in the Act as to its scope, as to make it utterly impossible to define or predict what property is the subject of regulation.

The District Court took notice of the fact that one can see up three blocks from Pennsylvania Avenue. Yet, admittedly, the Appellees have not sought to charge other properties visible from Pennsylvania Avenue. Surely the result of this construction is discriminatory. A vast number of buildings, tall or low, are certainly visible, but defendants do not include them on the official plat (J.A. 11).

Surely it is a vague standard to say that anything that can be seen without obstruction is covered. Does it mean the roof is visible? Does it mean that the building must be visible from all points on Pennsylvania Avenue or just selected points?

Appellants are not certain either whether the District Court means by its opinion that if Appellants' building had its rear facing Pennsylvania Avenue then the building would be excluded from coverage no matter how obnoxious a structure it proposed to build. Surely so absurd a result ought not lightly be imputed to Congress. Yet that is the strange result that must

obtain, since the District Court seems to agree that "abuts" means "to touch" (J.A. 23). The only other word we are left with is "fronts" upon, and since the District Court considers this as meaning "to face: as the house fronts toward the east", and includes property set back some distance, then the District Court apparently would not include property with its side or rear toward Pennsylvania Avenue, if it did not abut upon Pennsylvania Avenue.

The Shipstead-Luce Act, here in question, is not the first time that Congress has used the phrase "fronting or abutting on". The Act relating to removal of Snow and Ice in the District of Columbia, D.C. Code, Title 7, Sec. 801, (Sept. 16, 1922, 42 Stat. 845, Ch. 318 Sec. 1) provides:

"It shall be the duty of every person, partnership, corporation, joint-stock company, or syndicate in charge or control of any building or lot of land within the fire limits of the District of Columbia, fronting or abutting on a paved sidewalk, whether as owner, tenant, occupant, lessee, or otherwise, within the first eight hours of daylight after the ceasing to fall of any snow or sleet, to remove and clear away or cause to be removed and cleared away, such snow or sleet from so much of said sidewalk as is in front of or abuts on said building or lot of land."

Surely it would seem to be an absurdity to say that because Congress used the terms "fronting on", that Appellants are required to remove snow and ice from the sidewalks on Pennsylvania Avenue.

The District Court in its Memorandum Opinion indicated that the word "fronts" was more general than the word "abuts" (J.A. 23). Appellants respectfully suggest that this is plainly incorrect as a casual reference to the authorities would show. In fact, the word "fronts" is more limited than the word "abuts", and its most liberal construction goes no further than to equate it with the word "abuts."

"The word 'side' may be used in a generic sense so as to include the 'front', but it also has a specific meaning, which distinguishes it from 'front'. The word 'front' as applied to a house is always specific." Howland v. Andrus, 81 N.J. Eq. 175, 86 A. 391, 393.

In Aller v. Berkeley Hall School Foundation, 40 Cal. App. 2d 31, 103 P. 2d 1052, 1954 the Court said:

"The word 'front' is sometimes used to indicate any external line of property bordering on a street or road, when the evident purpose is to merely designate the lines which abut thereon. Strictly speaking, the word 'front' is used to distinguish that portion from the rear or sides of an object."

AND

In Staley v. Mears, (1957) 13 Ill., App. 2d 45, 142 N.E. 2d 835, the Court said:

"While it is true that a corner lot, such as Lot 22 does, in a certain sense, front on both streets, still, in the strict sense of that term, that portion of the lot, only, which is opposite the rear and faces upon the street, is properly designated as the front of such lot."

The District Court in its Memorandum Opinion indicated that interpretation of the term "fronting on" as used in street improvement statutes and as used in the statute in the case at bar "undoubtedly would be widely divergent" (J.A. 24).

This view seems to ignore a cardinal rule of statutory interpretation, namely, that words used in statutes are presumed to be used in their common ordinary sense.

Additionally, there seems to be every reason to say that similar usages would occur in the statute at bar as in street improvement statutes; for is not the object of the statute at bar to render benefit to public property, and is not the object of street improvement assessment statutes to charge private property for benefit rendered? In both situations the statutes are dealing with the relation of private property to public property.

Of course, as the cases indicate, the term in question has been used in a variety of statutory and non-statutory situations.

CONCLUSION

Appellants say that the right to own property and use it is a right under natural law and the common law, and antedates both Congress and the Constitution. Any law in derogation of this right ought to be strictly construed.

"All doubts must be resolved in favor of natural rights and against restrictions thereon." Staley v. Mears, (1957) 13 Ill. App. 2d 451, 142 N.E. 2d 835.

For the foregoing reasons, it is submitted that the District Court erred in granting defendants' motion for summary judgment and in denying the counter-motion of plaintiffs, and said judgment should be reversed.

Respectfully submitted,

DOUGLAS A. CLARK

LOUIS RABIL

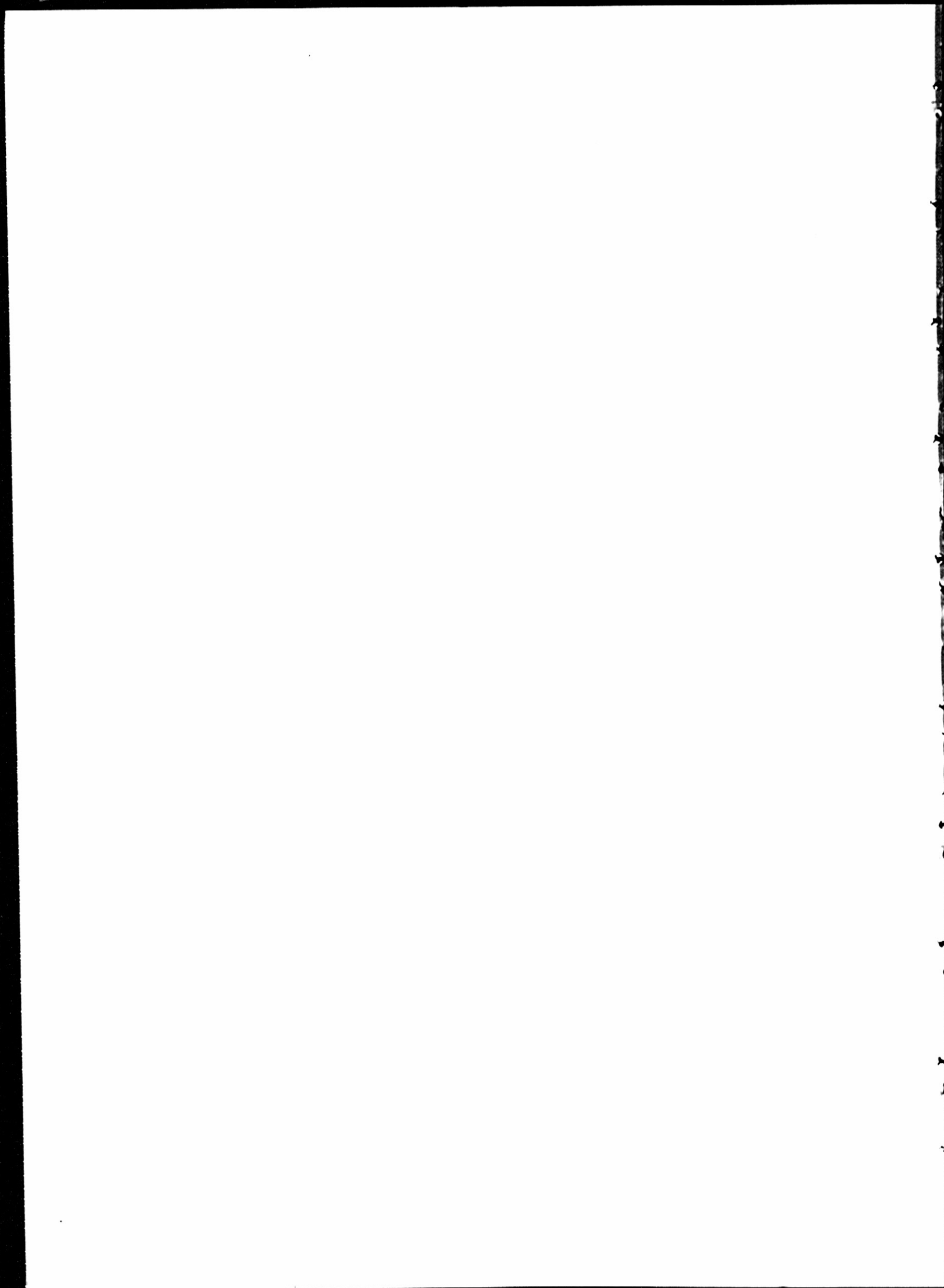
650 Warner Building
Washington 4, D. C.

Attorneys for Appellants

(i)

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JOINT APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANLEY COMPANY OF AMERICA, INC.,
A Corporation,
501 - 13th Street, N. W.,
Washington, D. C.

and

EARLE RESTAURANT, INC.,
A Corporation,
1307 "E" Street, N. W.,
Washington, D. C.

Plaintiffs

vs.

ROBERT E. MC LAUGHLIN, President
Board of District of Columbia Commissioners,
FREDERICK J. CLARKE, Engineer Commissioner,
Board of District of Columbia Commissioners,
MARK SULLIVAN, JR., Commissioner,
Board of District of Columbia Commissioners,

and

J. J. ILGENFRITZ, Director,
Department of Licenses and Inspection,
District Building,
Washington, D. C.

Defendants.

CIVIL ACTION
NO. 2863-60

DOCKET ENTRIESDateProceedings

1960

Aug. 30

Complaint, appearance; filed.

Aug. 30

Summons, copies (3) and copies (3) of Complaint
issued all ser 8-31-60.

Sept. 12

Amended complt. adding Mark Sullivan, Jr., Com-
missioner, Board of D. C. Commissioners.
(Fiat) Letts, J.

Sept. 12

Summons, copy & copy of complt. issued to Mark
Sullivan, Jr. ser. 9-13.

<u>Date</u>	<u>Proceedings</u>
<u>1960</u>	
Sept. 20	Stipulation of counsel to extend time defts may answer or respond to complt to and including Oct. 30, 1960; filed.
Oct. 31	Appearance of Chester H. Gray, John A. Earnest & George H. Clark for all defts; filed.
Dec. 15	Motion of defts. to dismiss or in the alternative, for summary judgment; c/m 12-15-60; Affidavit; Exhibits 1A, 1B, 1C, 1D, 1E, P & A; appearance of Chester H. Gray, John A. Earnest, George H. Clark; M.C. 12-15-60; filed.
Dec. 23	Stipulation of counsel extending time to file opposition to motion of debt for summary judgment or to dismiss; c/m 12-23-60; filed.
<u>1961</u>	
Jan. 24	Counter-motion of pltfs for summary judgment; P & A; c/m 1-23-61; Exhibits A & B; M.C. 1-24-61; filed.
Jan. 24	Answer of pltfs to defts motion for summary judgment, etc; P & A; c/m 1-23-61; filed.
Mar. 10	Motion of pltfs to substitute debt; P & A; c/m 3-6-61; filed.
Mar. 13	Consent order substituting Walter N. Tobriner as party debt. in lieu of Mark Sullivan, Jr. (N) Matthews, J.
Mar. 29	Motion to dismiss, or in alternative for summary judgment and counter-motion of pltfs for summary judgment argued and taken under advisement. (Reported by P. H. Mallon) Walsh, J.
May 17	Memorandum of opinion granting defts' motion for summary judgment. (N) Walsh, J.
May 24	Order denying motion of plaintiffs for summary judgment; granting motion of defts McLaughlin, Clark, and Tobriner, members of the Board of Commissioners of the District of Columbia, and J. J. Ilgenfritz, Director, Department of Licenses and Inspection and entering final judgment for them forthwith. (N) Walsh, J.
June 6	Notice of appeal of pltfs; deposit by Rabil \$5.00. (copy mailed to George H. Clark.); filed.

<u>Date</u>	<u>Proceedings</u>
<u>1961</u>	
June 13	Cost bond on appeal of pltfs with Glens Falls Insurance Co. in the sum of \$250.00 approved; (Fiat Youngdahl, J.); filed.
June 19	Transcript of proceedings of 3-29-61; pp. 1-26; (Rep. Parthenia H. Mallon.) (Clerk's Copy); filed.
June 22	Transcript of proceedings of March 29, 1961; pp. 1-26; (Rep. Parthenia H. Mallon) (Appellant's Copy); filed.
July 7	Exhibit of pltf; filed.

[Filed Sept. 12, 1960]

AMENDED COMPLAINT

(To Require Issuance of Necessary Permit To
Make Repairs and Remodel Existing Building.)

Come now the plaintiffs, there no Answer having been filed herein by the defendants, and file this Amended Complaint as follows:

1. Jurisdiction of this Court is invoked by reason of the fact that the amount in controversy is in excess of Three Thousand Dollars.

2. Robert E. McLaughlin is sued as President of the Board of District of Columbia Commissioners, Frederick J. Clarke is sued as Engineer Commissioner of the District of Columbia Commissioners, and Mark Sullivan, Jr. is sued as one of the Commissioners of the District of Columbia Commissioners, the governing body of the District of Columbia, a municipal corporation.

3. J. J. Ilgenfritz is sued as Director of the Department of Licenses and Inspections of the District of Columbia, who is under and subject to the control of the aforesaid Board of District of Columbia Commissioners.

4. The plaintiff, Stanley Company of America, Inc., a corporation, is the owner of premises, 501 - 13th Street, N. W., Washington, D. C., further described as Lot 39, Square 290, and the plaintiff, Earle Restaurant, Inc., a corporation, is the lessee of the basement of said building, the entrance

thereof being 503 - 13th Street, N. W., Washington, D. C., and operate in said basement a restaurant, and have operated said restaurant for a number of years.

5. Plaintiffs say that on, to wit, the 21st day of July, 1959, the plaintiff, Stanley Company of America, Inc., filed with the Government of the District of Columbia, through the Department of Licenses and Inspection, License Permit Division, Central Permit Section, and with the Government of the District of Columbia, Engineering Department, Central Permit Bureau, an application, accompanied by plans and specifications, for the making of repairs or alterations, and an application, with plans and specifications, for certain projections beyond the building line, said repairs and alterations to cost in excess of Twelve Thousand Dollars (\$12,000.00), which said sum was to be paid to the contractor by the plaintiff, Earle Restaurant, Inc., under the terms of its lease with the plaintiff, Stanley Company of America, Inc., said application, plans, and specifications in all manner and respect complied with all rules and regulations of the District of Columbia governing the issuance of such permits for repairs and alterations and projections beyond the building line.

6. Said Commissioners of the District of Columbia, through their servants, agents, and employees, referred said application to the Commission of Fine Arts, which said Commission did disapprove said application on or about, to wit, September 21, 1959.

7. Whereupon the Commissioners, through their servants, agents, and employees, did reject said application and denied granting a permit to the plaintiffs herein for the repair and remodeling of said building solely upon the disapproval of the said Commission of Fine Arts, said denial being dated August 24, 1960.

8. Plaintiffs say that the premises owned by the plaintiff, Stanley Company of America, Inc., and leased by the plaintiff, Earle Restaurant, Inc., is not subject to the jurisdiction of the Commission of Fine Arts, and said application should not have been referred to it.

9. Plaintiff, Stanley Company of America, Inc., says that it will suffer

irreparable loss and damage if said permit is not issued to repair and remodel the entrance to the premises leased by the plaintiff, Earle Restaurant, Inc., in that said premises will not be suitable for Earle Restaurant, Inc., its tenant, and the plaintiff, Earle Restaurant, Inc., says that it will suffer irreparable loss in that without the issuance of the permit, and the making of repairs and alterations, that the entrance to said premises leased by them will not be a suitable or inviting place for its customers, and it will be unable to retain its old customers, or entice new ones to enter, because said entranceway in its present state is in a deplorable and dilapidated condition and is not as such other modern restaurant businesses have in the District of Columbia today.

WHEREFORE, the plaintiffs ask judgment:

1. That Robert E. McLaughlin, President, Board of District of Columbia Commissioners, Frederick J. Clarke, Engineer Commissioner of the District of Columbia Commissioners, and Mark Sullivan, Jr., a Commissioner of the Board of District of Columbia Commissioners, and J. J. Ilgenfritz, Director of the Department of Licenses and Inspections, be required to forthwith issue the necessary permit to allow the plaintiffs to make said repairs and alterations as described in its plans and specifications which accompanied the application for said permit, and

2. For such other and further relief as the nature of this case may require and to which to this Court may seem just and proper.

/s/ Douglas A. Clark
DOUGLAS A. CLARK
LOUIS RABIL
Attorneys for Plaintiffs
650 Warner Building
Washington 4, D. C.
EXecutive 3-4541

[Certificate of Service]

[Filed Dec. 15, 1960]

**MOTION OF DEFENDANTS TO DISMISS OR, IN
THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

The defendants move the Court to dismiss the complaint or, in the alternative, to grant summary judgment in their favor on the following grounds:

1. The complaint fails to state a claim against the defendants upon which relief can be granted.

2. Consideration of the complaint together with this motion and the affidavit of Julian P. Green, and the exhibits attached thereto, said affidavit being designated as Exhibit 1, and by reference incorporated herein, demonstrates that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law.

/s/ Chester H. Gary
Corporation Counsel, D. C.

/s/ John A. Earnest
Assistant Corporation Counsel, D. C.

/s/ George H. Clark
Assistant Corporation Counsel, D. C.
Attorneys for defendants
District Building
Washington 4, D. C.

[Certificate of Service]

[Filed Dec. 15, 1960]

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION OF DEFENDANTS TO DISMISS OR, IN THE
ALTERNATIVE, FOR SUMMARY JUDGMENT**

* * * * *

Congress with particularity described the circumstances under which applications for permits must be submitted to the Commission of Fine Arts, i. e., where the building abuts Pennsylvania Avenue and where the building fronts on Pennsylvania Avenue.

The one word in the statute, the meaning of which is dispositive of the question raised in this case, is "front." If it can be said that the subject property fronts on Pennsylvania Avenue then plaintiff's claim that their property is not subject to the jurisdiction of the Commission of Fine Arts is untenable.

The word "front" according to Webster's New International Dictionary, Second Edition, means "to face; as, the house fronts toward the east,". That definition seems to represent the common understanding of the meaning of the word "front" and is not inconsistent with the definition used by the Commissioners of the District of Columbia and the National Capital Park and Planning Commission when they adopted the map delineating the boundaries of the Shipstead-Luce area.

The dictionary meaning of "front", together with the administrative interpretation thereof by the Commissioners of the District of Columbia and the National Capital Park and Planning Commission, as evidenced by Exhibit 1 A call for the conclusion that Congress used the word "front" to include within the Shipstead-Luce area all property which abutted Pennsylvania Avenue, as well as all property along Pennsylvania Avenue that was situated so that there was an unobstructed view of it from Pennsylvania Avenue. The administrative bodies have effectuated this intent by their interpretation.

In the instant case the administrative interpretation originated with the administrative bodies charged therewith by the Act, has continued for a long period of time, and was made at the time of the enactment of the statute. United States v. American Trucking Ass'ns., Inc., 301 U.S. 534, 60 S. Ct. 1059, 84 L. Ed. 1345.

* * * * *

/s/ Chester H. Gray
Corporation Counsel, D. C.

/s/ John A. Earnest
Assistant Corporation Counsel, D. C.

/s/ George H. Clark
Assistant Corporation Counsel, D. C.
Attorneys for defendants

[Filed Dec. 15, 1960]

AFFIDAVIT OF JULIAN P. GREEN, JR.

I, Julian P. Green, Jr., being first duly sworn on oath, depose and say:
I am Chief, Permit Branch, Licenses and Permit Division, Department of Licenses and Inspections, District of Columbia Government. In that capacity I have custody of all records concerning applications for permits and the issuance thereof.

I have examined the records in my custody and attached hereto copies of the documents which have to do with the application for a building permit filed by the Stanley Company of America, Inc. for exterior alterations to premises 503 13th Street, N.W., located on Lot 39 in Square 290. They are as follows:

A letter dated September 1, 1959 forwarding the application of Stanley Company of America, Inc. to the Commission of Fine Arts and the reply of said Commission.

A letter dated August 24, 1960 addressed to Stanley Company of America, Inc. notifying it that a permit could not be issued for the work indicated on the plans submitted.

A copy of the official map of the District of Columbia showing thereon the area covered by the Shipstead-Luce Act.

In addition to the above-mentioned exhibits, there is attached hereto a list of building permit applications submitted to the Commission of Fine Arts by the District of Columbia since January 1, 1955. The list includes the address of the property affected, the action of the Commission and the date of said action, and was compiled by me from the records in my custody.

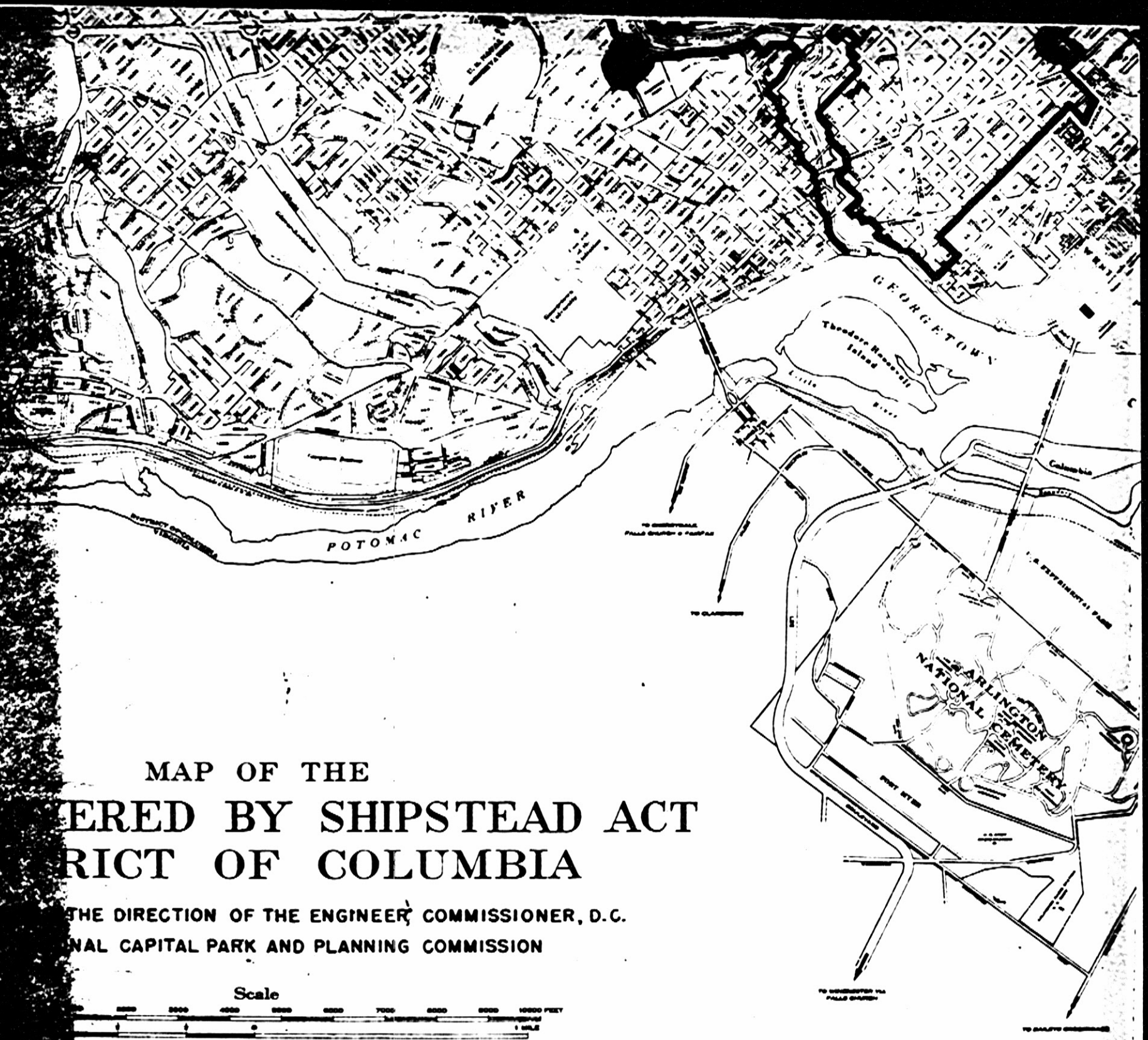
Also attached hereto is a copy of a plat of the intersection of 13th Street and Pennsylvania Avenue, N.W. The plat correctly designates the streets and demonstrates the relationship of Square 290 to Pennsylvania Avenue and E Street, N.W.

/s/ Julian P. Green, Jr.

[JURAT the 15th day of December, 1960.]

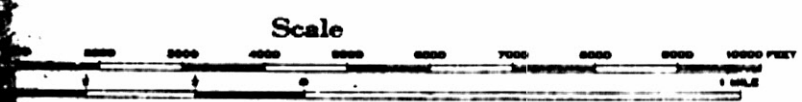






MAP OF THE ORDERED BY SHIPSTEAD ACT DISTRICT OF COLUMBIA

IN THE DIRECTION OF THE ENGINEER, COMMISSIONER, D.C.
 NATIONAL CAPITAL PARK AND PLANNING COMMISSION



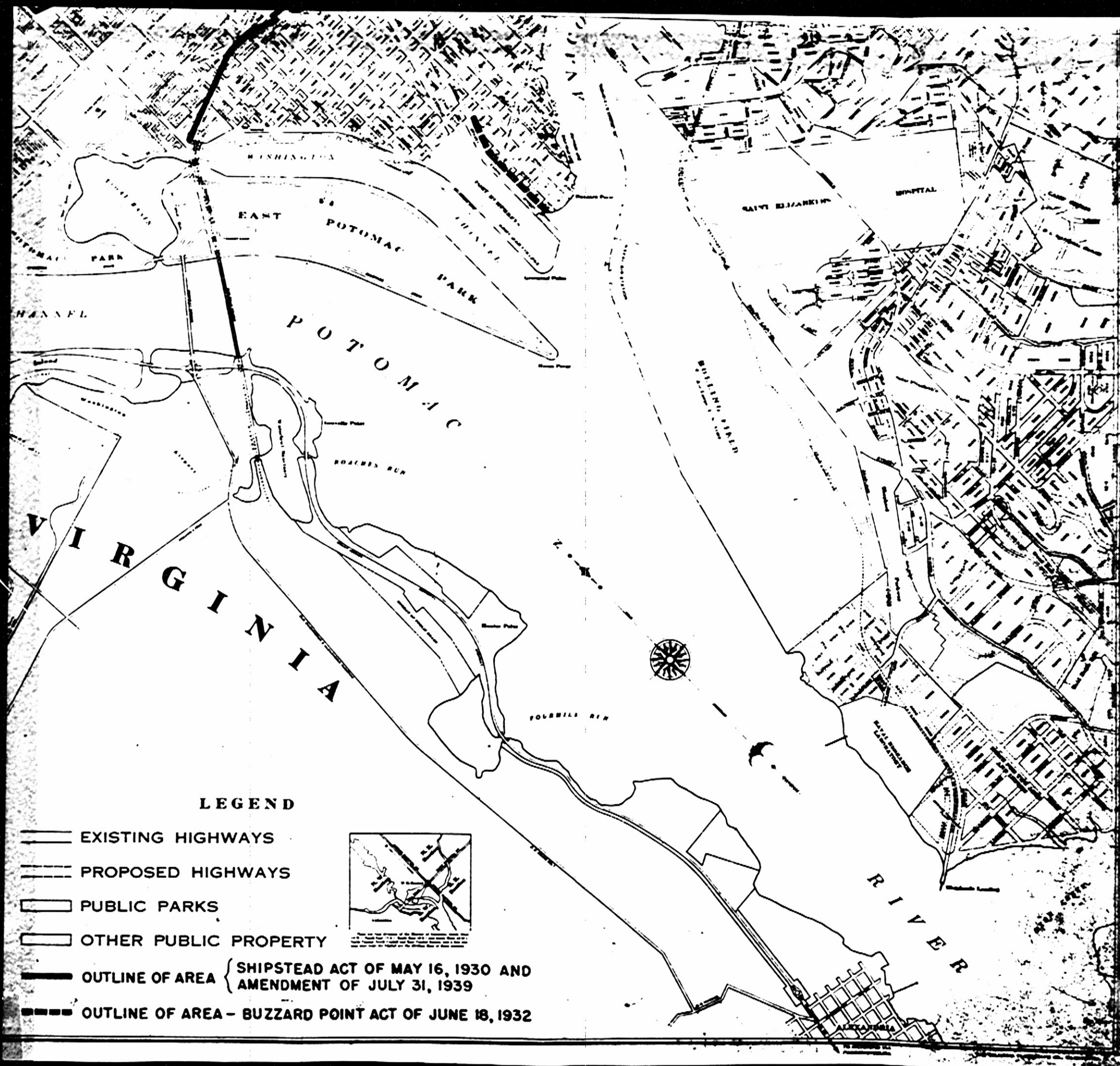
PUBLIC ACT NO. 231-71ST CONGRESS, APPROVED MAY 16, 1930

PLANNING COMMISSION
 1937 AND

APPROVED BY THE COMMISSIONERS
 OF THE DISTRICT OF COLUMBIA
 AUGUST 5, 1930-REVISED NOV. 23, 1937 AND
 OCTOBER 6, 1939

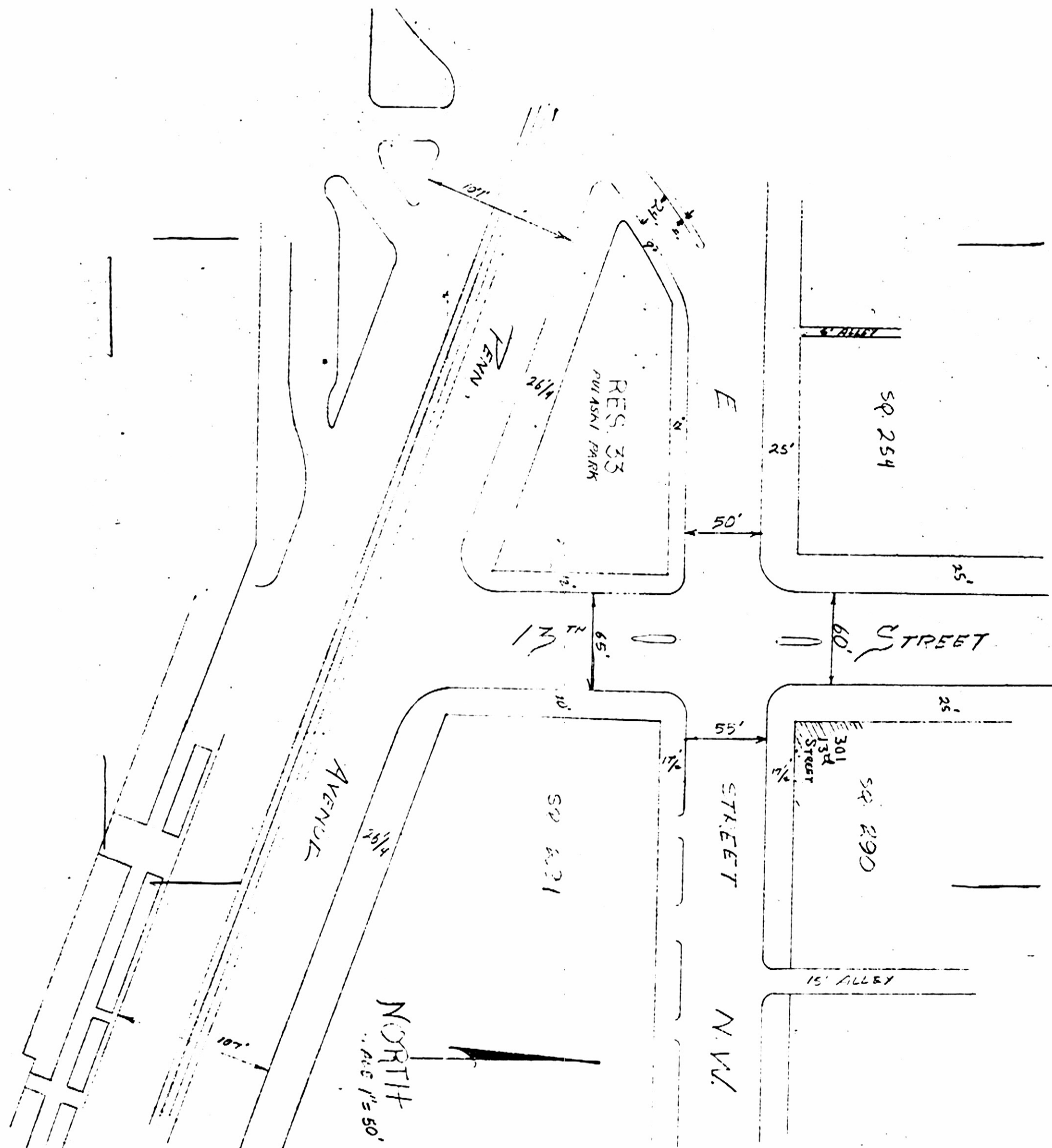
M. L. S. J. D. M. C. G. J. *G. M. L. L. L.*
 Commissioners of the District of Columbia

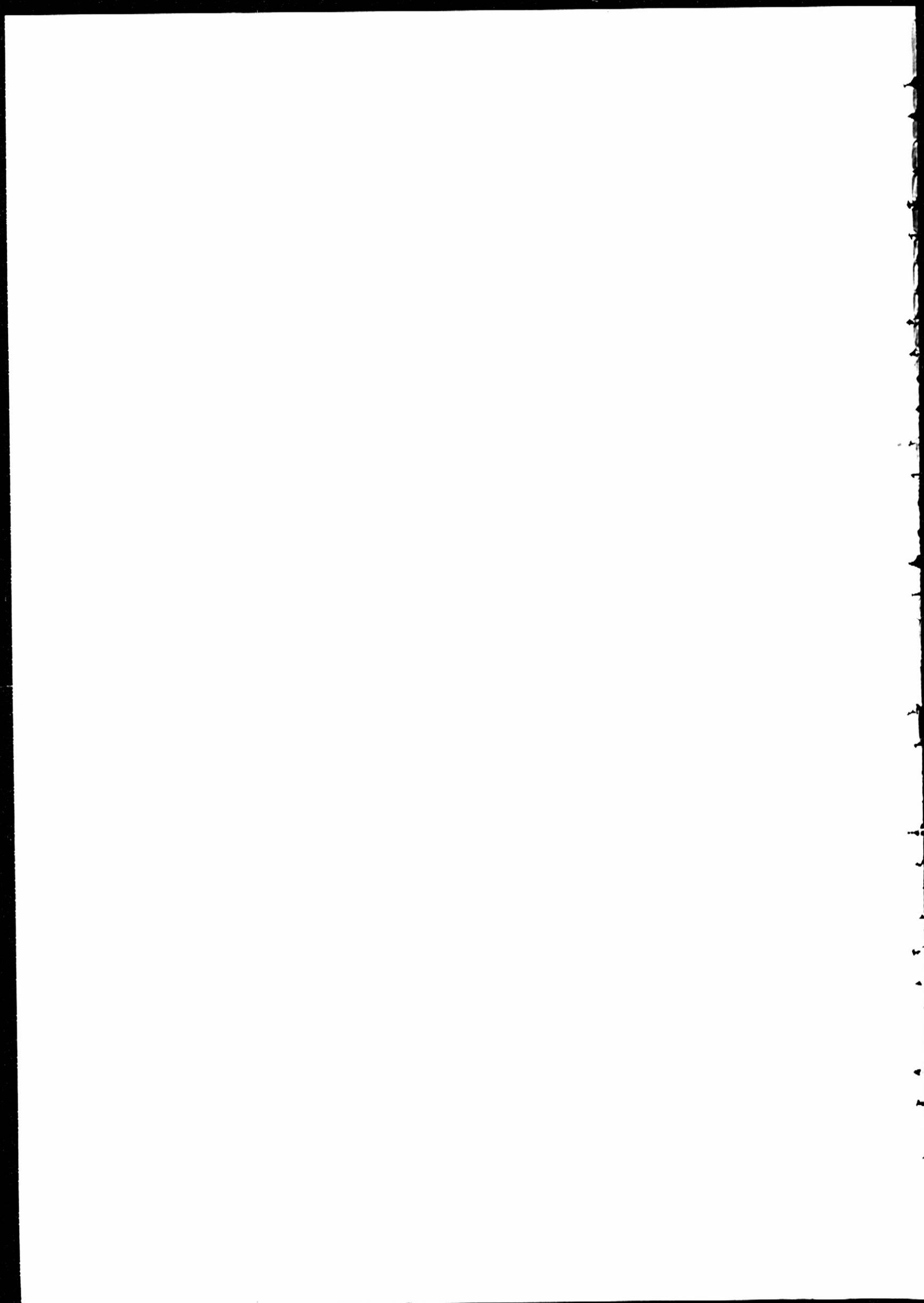
Note-Base used D.C. Permanent
 System of Highways Map 1939



11-12

EXHIBIT 1-B





[Filed Dec. 15, 1960]

DEFENDANTS' EXHIBIT 1 C

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department Of Licenses And Inspections
Washington, D. C.

Date - 9/1/59

To The Commission Of Fine Arts:

The accompanying application S. L. #2210 is forwarded for consideration and appropriate action in accordance with the provisions of the following Act:

THE OLD GEORGETOWN ACT - Public Law 808 - 81st Congress.
XX-SHIPSTEAD-LUCE ACT - Public Law 231, 71st Congress.

Premises: 503 - 13th St., N. W.

Lot: 39 Square: 290

Complies with applicable D. C. Regulations.

/s/ G. J. Long

JULIAN P. GREEN
Chief, Permit Branch

By - /s/ M. A. Callahan

.....

Date - 9/21/59

To The Chief, Permit Branch:

The accompanying application is returned by the Commission of Fine Arts with action as noted:

ACTION: Disapproved. Recommend restudy without projecting show windows, and using smaller, straight marquise.

DAVID E. FINLEY, Chairman

By - /s/ L. R. Wilson, Secretary
Commission of Fine Arts

[Filed Dec. 15, 1960]

DEFENDANTS' EXHIBIT 1 D

August 24, 1960

Stanley Corporation of American, Inc.
c/o Douglas A. Clark
650 Warner Building
Washington, D. C.

Gentlemen:

In reply to your recent inquiry regarding application filed for permit to remodel front of premises 503 Thirteenth Street, N. W., please be advised that permit may not be issued for the work indicated on plans submitted.

On September 21, 1959, the Commission of Fine Arts disapproved your request with the following suggestion, "Recommend restudy without projecting show windows and using smaller, straight marquis."

The above information was conveyed to your agent, Mr. B. L. Frishman, with the belief that the restudy requested would be made. As said restudy has not been submitted, and as the Board of Commissioners of the District of Columbia are required by Public Law 231, 71st Congress, to "take such action as shall in their judgment, effect reasonable compliance with such recommendation" of the Commission of Fine Arts, the Department of Licenses and Inspections may take no further action on the application and plans returned herewith.

/s/ Julian P. Green
Chief, Permit Branch

Enclosure:

Com. Fine Arts Referral #2210
Plans and Applications

JPG: mac

[Filed Dec. 15, 1960]

DEFENDANTS' EXHIBIT 1 E

DEPARTMENT OF LICENSES AND INSPECTIONS
 LICENSES AND PERMIT DIVISION
 PERMIT BRANCH

September 20, 1960

MEMORANDUM TO: The Corporation Counsel, D. C.

SUBJECT: Record of Permit Applications Referred to the
 Commission of Fine Arts For Premises Without
 Actual Frontage on Pennsylvania Avenue, N. W.

A review of building permit applications submitted to The Commission of Fine Arts since January 1, 1955, discloses the following listed cases which affected properties located between Seventh Street, N. W. and Fourteenth Street, N. W., within the bounds indicated on the attached map of the Shipstead-Luce Area, which properties however do not have actual frontage on Pennsylvania Avenue.

In each of the following cases, the Commissioners of the District of Columbia have without exception, taken the necessary action to effect reasonable compliance with the recommendations of The Commission of Fine Arts.

Shipstead-Luce Case Number	Address	Commission of Fine Arts Action	Date of Action
1719	811 Market Space, N. W.	Approved	1/17/55
1732	513 - 13th St., N. W.	Approved	3/21/55
1739	1347 E Street, N. W.	Disapproved	6/22/55
1769	803 Market Space, N. W.	Approved	6/21/55
1791	805 Market Space, N. W.	Approved	9/16/55
1804	1347 E Street, N. W.	Approved	12/1/55
1809	1013 D Street, N. W.	Approved *	1/13/56
1826	1347 E Street, N. W.	Disapproved	2/21/56
1828	1013 D Street, N. W.	Approved	3/1/56
1831	1305 E Street, N. W.	Disapproved	3/15/56
1853	1013 D Street, N. W.	Approved	5/9/56
1858	1005 D Street, N. W.	Approved *	6/15/56
1859	1003 D Street, N. W.	Approved	5/16/56
1873	1307 - 11 E Street, N. W.	Disapproved	8/8/56
1874	1011 D Street, N. W.	Approved	7/27/56
1878	1307-11 E Street, N. W.	Disapproved	8/8/56
1879	1329 E Street, N. W.	Approved *	10/23/56
1895	1011 D Street, N. W.	Disapproved	8/30/56

Shipstead-Luce Case Number	Address	Commission of Fine Arts Action	Date of Action
1900	403 - 11th Street, N. W.	Disapproved	9/14/56
1914	1303 E Street, N. W.	Disapproved	11/14/56
1916	1337 E Street, N. W.	Approved *	10/25/56
1935	1005 D Street, N. W.	Approved	12/18/56
1954	303 - 7th Street, N. W.	Approved *	2/8/57
1956	1337 E Street, N. W.	Approved *	2/14/57
1973	1337 E Street, N. W.	Approved *	5/28/57
1982	1313 E Street, N. W.	Approved *	5/28/57
1992	817 Market Space, N. W.	Disapproved	6/21/57
2001	945 D Street, N. W.	Disapproved	8/6/57
2016	1337 E Street, N. W.	Disapproved	9/19/57
2023	1337 E Street, N. W.	Approved *	11/4/57
2028	1301-05 E Street, N. W.	Disapproved	12/11/57
2084	817 Market Space, N. W.	Approved	6/18/58
2123	310 - 7th Street, N. W.	Approved *	11/3/58
2128	701 Market Space, N. W.	Approved *	12/17/58
2134	1329 E Street, N. W.	Approved	12/17/58
2136	1329 E Street, N. W.	Approved	12/17/58
2145	502 - 13th Street, N. W.	Disapproved	1/15/59
2149	701 Market Space, N. W.	Disapproved	3/18/59
2152	502 - 13th Street, N. W.	Approved *	3/9/59
2163	1349 E Street, N. W.	Disapproved	4/22/59
2167	701 Market Space, N. W.	Approved	5/26/59
2173	1349 E Street, N. W.	Disapproved	5/25/59
2178	502 - 13th Street, N. W.	Disapproved	6/18/59
2181	403 - 10th Street, N. W.	Approved *	6/18/59
2184	1349 E Street, N. W.	Approved	6/18/59
2185	1301 E Street, N. W.	Disapproved	7/1/59
2196	1345 E Street, N. W.	Disapproved	8/13/59
2200	501 - 13th Street, N. W.	Disapproved	8/13/59
2206	1345 E Street, N. W.	Approved *	8/20/59
2207	1301 E Street, N. W.	Disapproved	9/10/59
2210	503 - 13th Street, N. W.	Disapproved	9/21/59
2211	1331 E Street, N. W.	Approved	9/10/59
2227	821 Market Space, N. W.	Disapproved	11/17/59
2241	1331 E Street, N. W.	Approved *	1/13/60
2249	1015 D Street, N. W.	Approved	2/11/60
2251	1317 E Street, N. W.	Disapproved	3/15/60
2267	801 Market Space, N. W.	Disapproved	4/19/60
2283	817 Market Space, N. W.	Approved *	5/31/60
2303	801 Market Space, N. W.	Disapproved	7/19/60
2308	701 Market Space, N. W.	Approved *	8/1/60
2311	701 Market Space, N. W.	Approved *	8/1/60

* Approval conditioned on compliance with recommendations of The Commission of Fine Arts.

/s/ Julian P. Green
Chief, Permit Branch

* * *

[Filed Jan. 24, 1961]

PLAINTIFFS' COUNTER-MOTION FOR SUMMARY JUDGMENT

Come now the plaintiffs, Stanley Company of America, Inc., and Earle Restaurant, Inc., and respectfully move this Honorable Court to grant Summary Judgment in their favor for the reason that there is no genuine issue as to any material fact.

/s/ Douglas A. Clark
DOUGLAS A. CLARK
LOUIS RABIL
Attorneys for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

- I RULE 56, FEDERAL RULES OF CIVIL PROCEDURE.
- II THE COMPLAINT OF THE PLAINTIFFS FILED HEREIN.
- III THE MOTION OF DEFENDANTS TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT, AND EXHIBITS FILED THEREWITH AND THE RECORD IN THE CASE.
- IV PLAINTIFFS' EXHIBIT A, PHOTOGRAPHS OF BUILDING IN QUESTION SHOWING THIRTEENTH AND "E" STREETS. THE PLAINTIFFS' EXHIBIT B, PHOTOGRAPHS OF BUILDING IN QUESTION SHOWING THIRTEENTH AND "E" STREETS, THE PENNSYLVANIA BUILDING AND PENNSYLVANIA AVENUE TO THE RIGHT.
- V THE SOLE QUESTION IS ONE OF LAW, AS DEFENDANTS CONCEDE, AND INVOLVES THE INTERPRETATION OF AN ACT OF CONGRESS, SECTION 5-410 D. C. CODE, 1951 EDITION (KNOWN AS THE SHIPSTEAD-LUCE ACT.)

THE QUESTION IS WHETHER PLAINTIFFS' PROPERTY "FRONTS OR ABUTS UPON" PENNSYLVANIA AVENUE, AS EXPRESSED IN THE STATUTE.

* * * * *

/s/ Douglas A. Clark
DOUGLAS A. CLARK
LOUIS RABIL
Attorneys for Plaintiffs

[Certificate of Service]

[Filed Jan. 24, 1961]

**ANSWER TO MOTION OF DEFENDANTS TO DISMISS OR,
IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

Come now the plaintiffs and respectfully submit the following Points and Authorities in opposition to the defendant's Motion to Dismiss or, in the alternative, for Summary Judgment.

/s/ Douglas A. Clark
DOUGLAS A. CLARK
LOUIS RABIL
Attorneys for Plaintiffs

POINTS AND AUTHORITIES

1. Defendants' Motion concedes that there is no general issue of fact, and states the question of law relates to the interpretation of an Act of Congress known as "Shipstead-Luce Act", D. C. Code 5-411, 1951 Edition.

2. Plaintiffs' property clearly does not front or abut upon Pennsylvania Avenue within the meaning of the Statute in question and, therefore, plaintiffs' property is not subject to the jurisdiction of the Commission of Fine Arts.

3. Plaintiffs have filed a Counter-Motion for Summary Judgment, and respectfully ask that the Points and Authorities therein be incorporated herein by reference, and be expressly made a part of this Answer to the Motion of defendants.

Respectfully submitted, /s/ Douglas A. Clark
DOUGLAS A. CLARK
LOUIS RABIL
Attorneys for Plaintiffs

[Certificate of Service]

[Filed May 17, 1961]

MEMORANDUM

This matter comes before the Court on the Defendants' "Motion to dismiss or, in the alternative, for summary judgment" and on Plaintiffs' "Counter-motion for summary judgment". Oral argument was had, and memoranda of points and authorities filed on behalf of each of the parties.

By this action against the individual members of the Board of Commissioners of the District of Columbia, and J. J. Ilgenfritz, Director, Department of Licenses and Inspections for the District of Columbia, the Plaintiffs seek an order requiring Defendants to issue a permit to allow repairs and alterations to a structure owned by the Plaintiff, Stanley Company of America, Inc., and occupied in part by the Plaintiff, Earle Restaurant, Inc., described as Lot 39, Square 290, in the District of Columbia, and known as premises 501 Thirteenth Street, N. W.

The Plaintiff, Stanley Company of America, Inc., filed with the Government of the District of Columbia an application for a building permit for repairs and alterations to the entry-way of the Earle Restaurant, together with the plans and specifications therefor. Plaintiffs allege that these plans and specifications complied in all respects with the applicable rules and regulations of the District of Columbia; that the Commissioners of the District of Columbia referred the application to the Commission of Fine Arts, which disapproved the application on September 21, 1959; that the Commissioners of the District of Columbia on August 24, 1960, rejected the Plaintiff's application solely on the ground that the Commission of Fine Arts had disapproved it; that the Commissioners of the District of Columbia should not have referred the application to the Commission on Fine Arts for the reason that the subject property is not within the jurisdiction of the Commission of Fine Arts; and that the Plaintiffs will suffer irreparable loss and damage if the permit to repair and remodel the entrance to the premises here involved is not issued.

A permanent Commission of Fine Arts was created by Act of Congress, May 17, 1910, to be composed of seven well qualified judges of the fine arts,

whose duty was to advise "generally upon questions of art when required to do so by the President, or by any committee of either House of Congress." 40 U.S.C. 104. The Shipstead-Luce Act of May 16, 1930, 46 Stat. 366, gave to the Commission of Fine Arts the duty of approving or disapproving plans for the erection or alteration of buildings, the duty having been imposed upon Congress by the Constitution to exercise a reasonable degree of control over the architecture of private or semi-public buildings adjacent to public buildings and grounds of major importance.^{1/}

As noted by the Corporation Counsel, section 2 of the Act, Title 5, Section 411, D. C. Code, directs the Commissioners of the District of Columbia, in consultation with the National Capital Park and Planning Commission, to prepare plats defining the areas within which applications for building permits were to be submitted to the Commission on Fine Arts for its recommendations.^{2/}

^{1/} Section 1 of the Act, 40 USC §121, reads in pertinent part as follows:

"In view of the provisions of the Constitution respecting the establishment of the seat of the National Government, the duties it imposed upon Congress in connection therewith, and the solicitude shown and the efforts exerted by President Washington in the planning and development of the Capital City, it is declared that such development should proceed along the lines of good order, good taste, and with due regard to the public interests involved, and a reasonable degree of control should be exercised over the architecture of private or semipublic buildings adjacent to public buildings and grounds of major importance. To this end, hereafter when application is made for permit for the erection or alteration of any building, any portion of which is to front or abut upon the, the portion of Pennsylvania Avenue extending from the Capitol to the White House, ..., or abutting upon any street bordering any of said grounds or parks, the plans therefor, so far as they relate to height and appearance, color, and texture of the materials of exterior construction, shall be submitted by the Commissioners of the District of Columbia to the Commission of Fine Arts; and the said Commission shall report promptly to said Commissioners its recommendations, including such changes, if any, as in its judgment are necessary to prevent reasonably avoidable impairment of the public values belonging to such public building or park; and said Commissioners shall take such action as shall, in their judgment, effect reasonable compliance with such recommendation; . . ."

^{2/} See Exhibit A, attached, which is a plat demonstrating the relationship of the premises here in question, 501 - 13th Street, N. W., to Pennsylvania Avenue and Pulaski Park, N. W.

The Commissioners of the District of Columbia and the National Capital Park and Planning Commission, in pursuance of their statutory authority, adopted a map on August 5, 1930, wherein they defined the area included within the jurisdiction of the Commission of Fine Arts. This plat was revised on November 23, 1937, and later on October 6, 1939; however, neither of the two revisions changed the boundary lines as originally established in the area of Thirteenth Street and Pennsylvania Avenue.

Under a form letter dated September 1, 1959, the Chief of the Permit Branch, Department of Licenses and Inspections, District of Columbia, forwarded the application of the Plaintiff to the Commission of Fine Arts, for its consideration and appropriate action. The form letter was returned to the Chief of the Permit Branch on September 21, 1959, with a notation of the action of the Commission of Fine Arts reading, "Disapproved. Recommend restudy without projecting show windows, and using smaller, straight marquise." By letter dated August 24, 1960, the Chief of the Permit Branch informed the Plaintiff, care of Counsel, Douglas A. Clark, that no further action was intended with respect to the application and the plans were returned therewith.^{3/}

The government contends that referral of applications such as that in the instant case by the Commissioners of the District of Columbia to the Commission of Fine Arts is in accordance with Congressional directive. It also contends that the plat, a portion of which is depicted in Exhibit A, was approved and adopted by the Commissioners of the District of Columbia and the National Capital Park and Planning Commission pursuant to Act of Congress, and that the boundary as indicated therein at Thirteenth Street and Pennsylvania Avenue, N. W., was established in conformance with the statute. The Government produced a list of 61 other similar cases, dating

^{3/} The letter stated in part:

"The above information was conveyed to your agent, Mr. B. L. Frishman, with the belief that the restudy requested would be made. As said restudy has not been submitted, and as the Board of Commissioners of the District of Columbia are required by Public Law 231, 71st Congress, to 'take such action as shall in their judgment, effect reasonable compliance with such recommendation' of the Commission of Fine Arts, the Department of Licenses and Inspections may take no further action on the application and plans returned herewith."

from January 1955 to August 1960, wherein owners of property between Seventh Street and Fourteenth Street, Northwest, had submitted applications for approval of alterations, etc., where the land did not actually physically touch Pennsylvania Avenue. Plaintiffs meanwhile contend that their property clearly does not front or abut upon Pennsylvania Avenue within the meaning of the Shipstead-Luce Act, and, therefore, Plaintiff's property is not subject to the jurisdiction of the Commission of Fine Arts.

The principal question involved here is one of interpretation of section 1 of the Shipstead-Luce Act. It was declared to be a policy of Congress, as stated therein, that the planning and development of Washington, D. C., should be conducted with due regard to the public interest, good taste, etc. It must be noted that Congress stated in section 1 that a "reasonable degree of control should be exercised over the architecture of private or semi-public buildings adjacent to public buildings and grounds of major importance." (emphasis supplied.) The Court will confine itself to this portion of section 1 before going on to other portions.

The term "adjacent" is defined in Webster's New International Dictionary, 2nd Ed., 1939, as meaning: "lying near, close or contiguous, neighboring, bordering on; . . .", and is further illustrated therein to the effect that objects are "adjacent when they lie close to each other, but not necessarily in actual contact." Also, as noted in 1 C. J. S. 1464, 1465, Adjacent is defined to mean "In ordinary acceptation, the natural and primary, or the ordinary, meaning of the word is close, close at hand, close to, convenient, in the neighborhood or vicinity of, in proximity, near, nearby, neighboring, next to, nigh, present, not necessarily touching or in actual physical contact with." It appears to the Court that it is the word "adjacent" which more accurately describes the control over property which Congress intended to be reposed in the Commission of Fine Arts in making recommendations to the Commissioners of the District of Columbia for the alteration of any building "any portion of which is to front or abut upon the . . . portion of Pennsylvania Avenue extending from the Capitol to the White House." While noting that the most important objection to a bill giving the

Fine Arts Commission rather broad power was that the authority of the Commission would be or might be extended to govern structures adjacent to minor reservations, the Congressional Report on the Shipstead-Luce Act indicates an earlier bill was redrawn to confine the control of the Commission over property to that adjacent to certain specified locations, among which was the portion of Pennsylvania Avenue here involved.^{4/}

Keeping in mind, therefore, that it is the Court's opinion that it was the intention of Congress to control alterations to buildings adjacent to Pennsylvania Avenue, the Court turns its attention to the portion of section 1 wherein the Commission of Fine Art's jurisdiction was set forth. In this portion of the Act the language is stated as giving jurisdiction to the Fine Arts Commission when any portion of the property would "front or abut" on specified grounds, such as Pennsylvania Avenue.

The intransitive verb "front" is defined in Webster's New International Dictionary, 2nd Ed. (1939), as "to face; as, the house fronts toward the east." It is noted further that the courts generally have construed the word according to the circumstances of a particular case. 37 C. J. S. 1386, Front. The word "abut," on the other hand, is defined as meaning "to border, border on, . . . to touch;" and is much less subject to interpretation than the words "adjacent" or "front" and is more restrictive in describing location or premises. However, it is the Court's opinion that the words "front and "abut" were used in the statute disjunctively rather than conjunctively, and that they must be read in the light of the declared purpose

^{4/} S. Rep. No. 68, 71st Cong., 2nd Sess. (1929):

"A bill was drawn to give the Fine Arts Commission some control over the nature of buildings fronting on public grounds. This measure, however, met with several objections. Probably the most important objection was that the authority of the commission would thereby be extended to govern structures adjacent to minor reservations. Such jurisdiction, it was contended, might tend to harass unduly the owners of private property and expose them to unnecessary hardships. As a consequence of these criticisms, the bill was redrawn to confine the control of the commission over property adjacent to certain specified locations, namely, . . . the portion of Pennsylvania Avenue from the Capitol to the White House . . . This bill, it will be seen, restrains the original proposal to the more important public areas."

of the statute, which speaks in terms of the control of alterations to buildings adjacent to Pennsylvania Avenue. Taken in this context, the Court considers that the interpretation placed on the word "front," as used in the Shipstead-Luce Act, by the Commissioners of the District of Columbia and the National Capital Park and Planning Commission, in deciding whether the Plaintiff's property "fronts or abuts" on Pennsylvania Avenue, is in conformance with the intention of Congress as expressed in the statute.

While the Court has not placed great reliance on the administrative construction of the statute here involved, some weight must certainly be accorded it. Federal Trade Commission v. Mandel Bros., Inc., 359 U. S. 385 (1959). However, after consideration of the legislative history, the dictionary meaning of the words involved, the administrative interpretation applied, the language of the Act taken in the context in which it appears, and ascribing a standard of a reasonable degree of control to the Commissions as appears to be the declared intention of Congress in the Act, the Court reaches the conclusion that the Plaintiff's property is within the jurisdiction of the Commission of Fine Arts.

The Court does not consider the cases involving tax assessments of property "fronting or abutting" on a certain street or area to be controlling in this case, as suggested by the Plaintiffs. Crosby v. Moebs, 61 App. D. C. 42, 57 F. 2d 408 (1932). What might be considered as fronting on Pennsylvania Avenue for purposes of regulating the planning for buildings along the lines of good order and good taste and fronting along the Avenue for purposes of tax assessments for improvements, etc., may, and undoubtedly would be widely divergent. The Court must construe the terms involved here and must review the interpretation placed on such terms by the administrative agencies involved on the basis of the circumstances as they exist in this specific case. Moreover, the aesthetic value to the citizens of maintaining the parks and avenues of the Capital City along the lines of good taste must be considered here, and the Court cannot fail to recognize that control over such planning and development along Pennsylvania Avenue cannot help but "enhance the value of adjacent private property," including

that of the Plaintiff as Congress has indicated was its intention in enacting the Shipstead-Luce Act. S. Rep. No. 68, supra, p. 2.

Counsel for the District of Columbia Government will therefore submit an appropriate order in conformance with this Opinion, granting Defendants' motion for summary judgment.

May 17, 1961

/s/ Leonard P. Walsh
Judge

Douglas A. Clark, Esq., and Louis Rabil, Esq.,
650 Warner Building
Attorneys for Plaintiffs

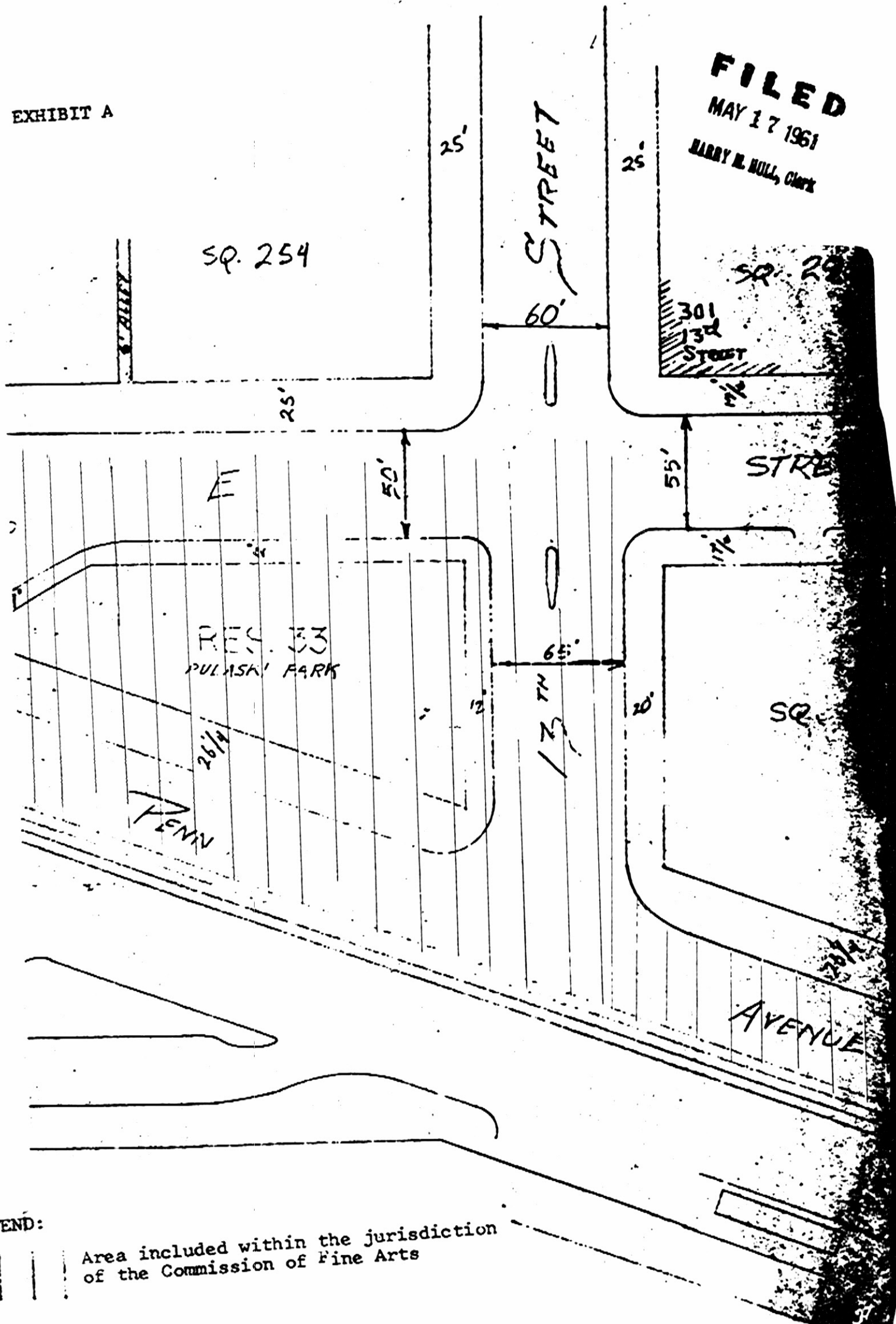
Hon. Chester H. Gray, Corporation Counsel, D. C.;
John A. Earnest, Esq., and George H. Clark, Esq., Assistants,
District Building
Attorneys for the Defendants.

EXHIBIT A

FILED

MAY 17 1961

HARRY M. HULL, Clerk



[Filed May 24, 1961]

O R D E R

Upon consideration of the motion of the defendants for summary judgment, the exhibits attached thereto with the memorandum of points and authorities in support thereof, the cross-motion of the plaintiff for summary judgment with the exhibits attached thereto together with the memorandum of points and authorities in support thereof, the opposition to the respective motions of said parties and of oral argument of counsel for the respective parties in open court, and it appearing to the Court that there is no genuine issue of material fact and that the defendants are entitled to judgment as a matter of law, it is by the Court this 24th day of May, 1961,

ORDERED: That, the motion of the plaintiffs for summary judgment be, and it is hereby, denied, and

FURTHER ORDERED: That, the motion of defendants Robert E. McLaughlin, Frederick J. Clarke and Walter N. Tobriner, members of the Board of Commissioners of the District of Columbia, and J. J. Ilgenfritz, Director, Department of Licenses and Inspections be, and it is hereby, granted, and final judgment for said defendants shall be entered forthwith.

/s/ Leonard P. Walsh
Judge

[Certificate of Service]

[Filed June 6, 1961]

NOTICE OF APPEAL

Notice is hereby given this 6th day of June, 1961, that the plaintiffs, Stanley Company of America, Inc., a corporation, and Earle Restaurant, Inc., a corporation, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 24th day of May, 1961 in favor of defendants against said plaintiffs.

/s/ Louis Rabil
Attorney for plaintiffs

[Filed July 7, 1961]

PLAINTIFF'S EXHIBIT

71st Congress)	CALENDAR NO. 68	(Report
2d Session)	SENATE	(No. 68

REGULATING THE HEIGHT, DESIGN, AND CONSTRUCTION OF PRIVATE
AND SEMIPUBLIC BUILDINGS IN THE NATIONAL CAPITAL

December 13 (calendar day, December 19), 1929. --- Ordered to be printed

MR. CAPPER, from the Committee on the District of Columbia, submitted
the following

R E P O R T

[To accompany S. 2400]

* * * * *

A bill was drawn to give the Fine Arts Commission some control over the nature of buildings fronting on public grounds. This measure, however, met with several objections. Probably the most important objection was that the authority of the commission would thereby be extended to govern structures adjacent to minor reservations. Such jurisdiction, it was contended, might tend to harrass unduly the owners of private property and expose them to unnecessary hardships.

As a consequence of these criticisms, the bill was redrawn to confine the control of the commission over property adjacent to certain specified locations, namely the Capitol Grounds, the White House Grounds, the portion of Pennsylvania Avenue from the Capitol to the White House, Rock Creek Park, the Zoological Park, the Rock Creek and Potomac Parkway, Potomac Park, the Mall Park system, and public buildings adjacent thereto.

The proposed amendment to this bill, as recommended by the committee, is designed to include any extension of the present Mall development, in view of the probable extension of the public buildings grouped around the Mall.

This bill, it will be seen, restrains the original proposal to the more important public areas.

* * * * *

Erection of structures incongruous to the Federal plan, on land bordering any of the reservations mentioned in the bill, certainly would seriously detract from the esthetic and intrinsic values of public and private property alike.

A marked necessity for such legislation as this exists to-day. Rock Creek Park is lined with private property, and from time to time there are erected private buildings which interfere with the beauty of the landscape and diminish the pleasure of those enjoying the park.

* * * * *

438
BRIEF FOR APPELLEES

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 16,482

STANLEY COMPANY OF AMERICA, INC.,
and
EARLE RESTAURANT, INC.,

Appellants,

v.

WALTER N. TOBRINER,
FREDERICK J. CLARKE,
JOHN B. DUNCAN,
District of Columbia Commissioners,
and
J. J. ILGENFRITZ,

Appellees.

Appeal From The United States District Court
For The District Of Columbia

United States Court of Appeals
For the
District of Columbia Circuit
FILED SEP 18 1961

Joseph W. Stewart
CLERK

CHESTER H. GRAY,
Corporation Counsel, D. C.,
MILTON D. KORMAN,
Principal Assistant
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HUBERT B. PAIR,
Assistant Corporation
Counsel, D. C.,
JOHN R. HESS,
Assistant Corporation
Counsel, D. C.,
Attorneys for Appellees,
District Building,
Washington 4, D. C.

STATEMENT OF QUESTION PRESENTED

In the opinion of the appellees, the question is:

Does not appellants' property, located as it is in full view of and in close proximity to Pennsylvania Avenue, "front upon" such Avenue for the purposes of the "Shipstead-Luce Act" so as to require the appellees to refer to the Commission of Fine Arts for approval appellants' application for a permit to alter such property?

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<u>Because appellants' property "fronts upon"</u> <u>Pennsylvania Avenue for purposes of the</u> <u>"Shipstead-Luce Act", the appellees were</u> <u>required to submit to the Commission of</u> <u>Fine Arts for approval the application for</u> <u>a permit to alter such property.</u>	2
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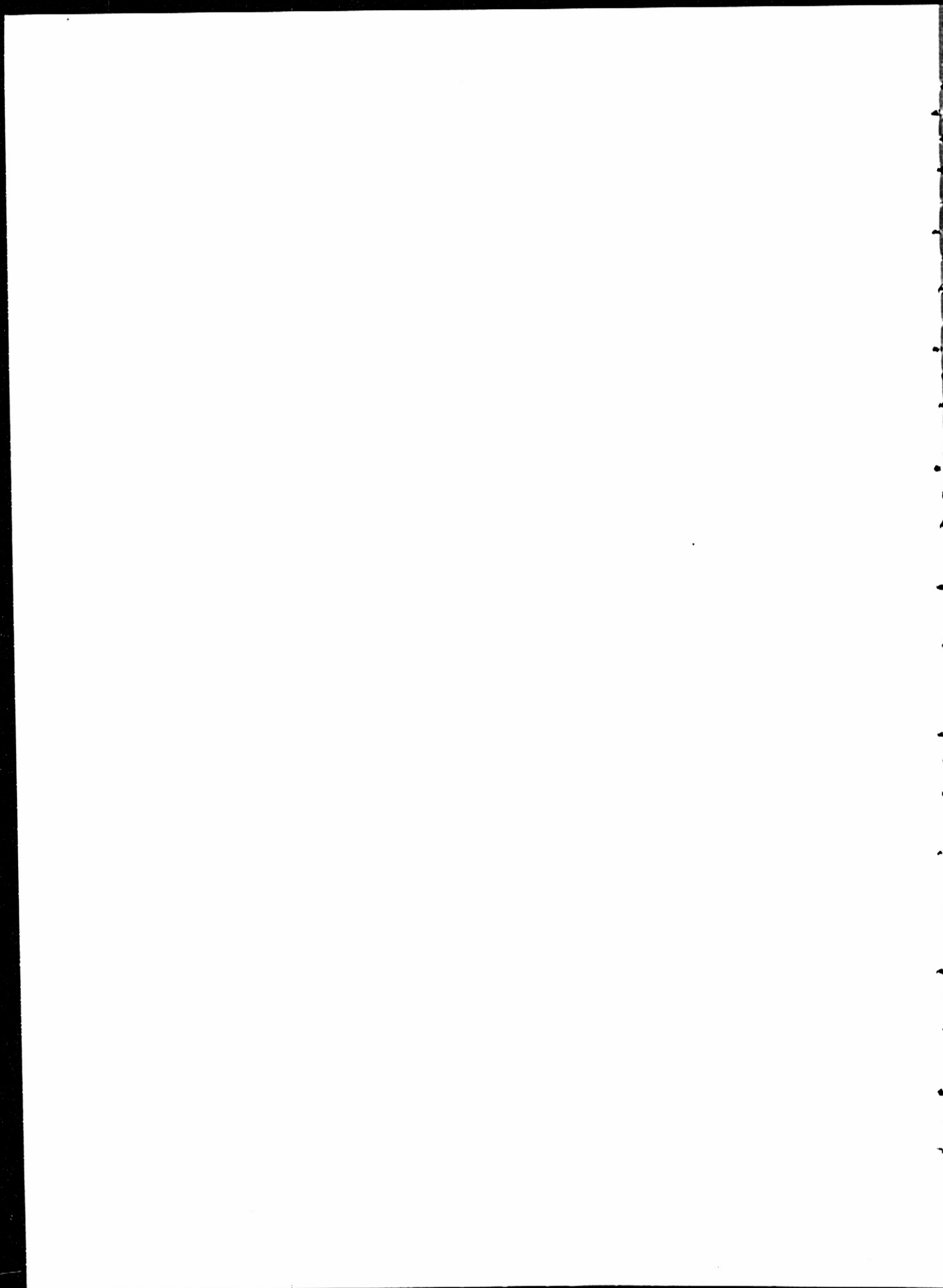
CASES CITED

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STATUTE CITED

* Act of May 16, 1930 ch. 291, 46 Stat. 366, U.S.C., Title 40 § 121, D.C. Code, 1951, Title 5 § 410, 411	2
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* Authority chiefly relied upon is marked by asterisk.



UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 16,482

STANLEY COMPANY OF AMERICA, et al.,

Appellants,

v.

WALTER N. TOBRINER, et al.,

Appellees.

BRIEF FOR APPELLEES

Appeal From The United States District Court
For The District Of Columbia

SUMMARY OF THE ARGUMENT

Appellants' property "fronts upon" Pennsylvania Avenue within the meaning of the "Shipstead-Luce Act." This conclusion necessarily follows from a reading of the preamble of the Act, the provisions of the Act itself, and an examination of the plat prepared pursuant to the Act

shortly after its passage. Although the words "front upon," when used in various contexts, are subject to different interpretations, as used in the "Shipstead-Luce Act," such words have for a long period of time been administratively interpreted to encompass areas close to and within full view of Pennsylvania Avenue.

ARGUMENT

Because appellants' property "fronts upon" Pennsylvania Avenue for purposes of the "Shipstead-Luce Act", the appellees were required to submit to the Commission of Fine Arts for approval the application for a permit to alter such property.

The "Shipstead-Luce Act"¹ directs that " * * * when application is made for permit for the erection or alteration of any building, any portion of which is to front or abut upon * * * the portion of Pennsylvania Avenue extending from the Capitol to the White House * * *, the plans therefor * * * shall be submitted by the Commissioners of the District of Columbia to the Commission of Fine Arts * * * ." [Emphasis supplied] Upon receipt of the report and recommendation of the Commission of Fine Arts, the Commissioners of the District of Columbia are required to " * * * take such action as shall, in their judgment, effect reasonable compliance with such recommendation * * * ."

Appellants' building is located on Lot 39 in Square 290 at the northeast corner of Thirteenth and E Streets, Northwest (J.A. 11-13).

¹ Act of May 16, 1930, ch. 291, 46 Stat. 366, U.S.C., Title 40 § 121, D.C. Code, 1951, Title 5 § 410, 411.

At Fourteenth Street, one block west of appellants' property, E Street merges with Pennsylvania Avenue, which runs diagonally from Southeast to Northwest. A long, narrow, triangular public park extending from Thirteenth Street nearly to Fourteenth Street, is all that separates E Street and Pennsylvania Avenue (J.A. 9-10).

As can be seen from the above description of the area, no part of appellants' property touches or abuts Pennsylvania Avenue. The question arises, then, as to whether appellants' property "fronts upon" Pennsylvania Avenue within the meaning of the Act.

Depending upon the result intended, various interpretations have been placed on the term "front upon." In order to determine what the Congress intended when it used the term "front upon" in the "Shipstead-Luce Act," one should examine the preamble to the Act.

The purpose of the Act, as defined by Congress, was to insure that development in certain defined areas in the District be controlled so as to " * * * proceed along the lines of good order, good taste, and with due regard to the public interests involved, and a reasonable degree of control should be exercised over the architecture of private or semi-private buildings adjacent to public buildings and grounds of major importance." [Emphasis supplied]

From a reading of the foregoing, it becomes apparent that the Congress intended to exercise control over changes in the appearance of the exteriors of private buildings adjacent to areas of major importance. Considering the purpose of the Act and the fact that Pennsylvania Avenue, between the Capitol and the White House, has been designated as an area of major importance, it is unrealistic to think that the Congress intended the Act to cover those properties touching Pennsylvania Avenue to the complete exclusion of those properties which face and are within full view of the Avenue. An unsightly building close to and within full view of Pennsylvania Avenue would detract from the appearance of the Avenue to the same extent as an unsightly building abutting the Avenue.

Perhaps, realizing that the words "front upon" are subject to various interpretations, the Congress, after specifying in detail the results intended by the legislation, placed in the Commissioners of the District of Columbia, in consultation with the National Capital Park and Planning Commission, the responsibility of preparing plats defining the areas within which application for building permits shall be submitted to the Commission of Fine Arts for its recommendations (Section 5-411, D.C. Code, 1951).

Such a plat was prepared and approved on August 5, 1930, (J. A. 9-10). Appellants' property, together with many other properties which do not actually abut Pennsylvania, but which are adjacent to and within clear view of the Avenue, are included in the plat as areas to be covered by the Act. The Commissioners of the District of Columbia have consistently referred applications for permits to repair said properties to the Commission of Fine Arts for approval (J. A. 15-16).

It is a well settled principle of law that "[a]n administrative official charged with the duty of administering a specific statute has a duty to determine as an initial and administrative matter the meanings of terms in that statute." The California Company v. Udall, U.S. Ct. of App. D.C., No. 16,132, dated August 10, 1961. His action in making such a determination will not be disturbed by the Courts unless it is shown that he has abused his discretion. The California Company v. Udall, supra.

Appellants contend that the term "front upon" means to touch. If this interpretation were correct, it would have been unnecessary for the Congress to include the words "front upon" in the statute, because "abut upon" also means to touch. Since the words "front" and "abut" are used in the statute disjunctively rather than conjunctively, it is obvious

that the word "front" was placed there for a specific purpose and not to be emasculated therefrom by an interpretation such as that advanced by the appellants. "The Cardinal principle of statutory construction is to save and not to destroy" Labor Board v. Jones and Laughlin Steel Corporation, 301 U.S. 1, 30, 57 S. Ct. 615, 81 L. Ed. 893, and "to give effect, if possible, to every clause and word of a statute" Montchair v. Ramsdell, 107 U.S. 147, 152, 2 S. Ct. 391, 27 L. Ed. 431.

The effect of the Commissioners' interpretation of the terms "front upon" and "abut upon" is to make each meaningful. By doing so, they have carried out the purposes of the Act as expressed by the Congress.

CONCLUSION

Upon consideration of the purposes of the "Shipstead-Luce Act," of the Act itself, and of the consistent administrative interpretation thereof by the Commissioners of the District of Columbia, it is respectfully submitted that appellants' property is subject to the jurisdiction of the Act, and that the judgment of the lower court should, therefore, be affirmed.

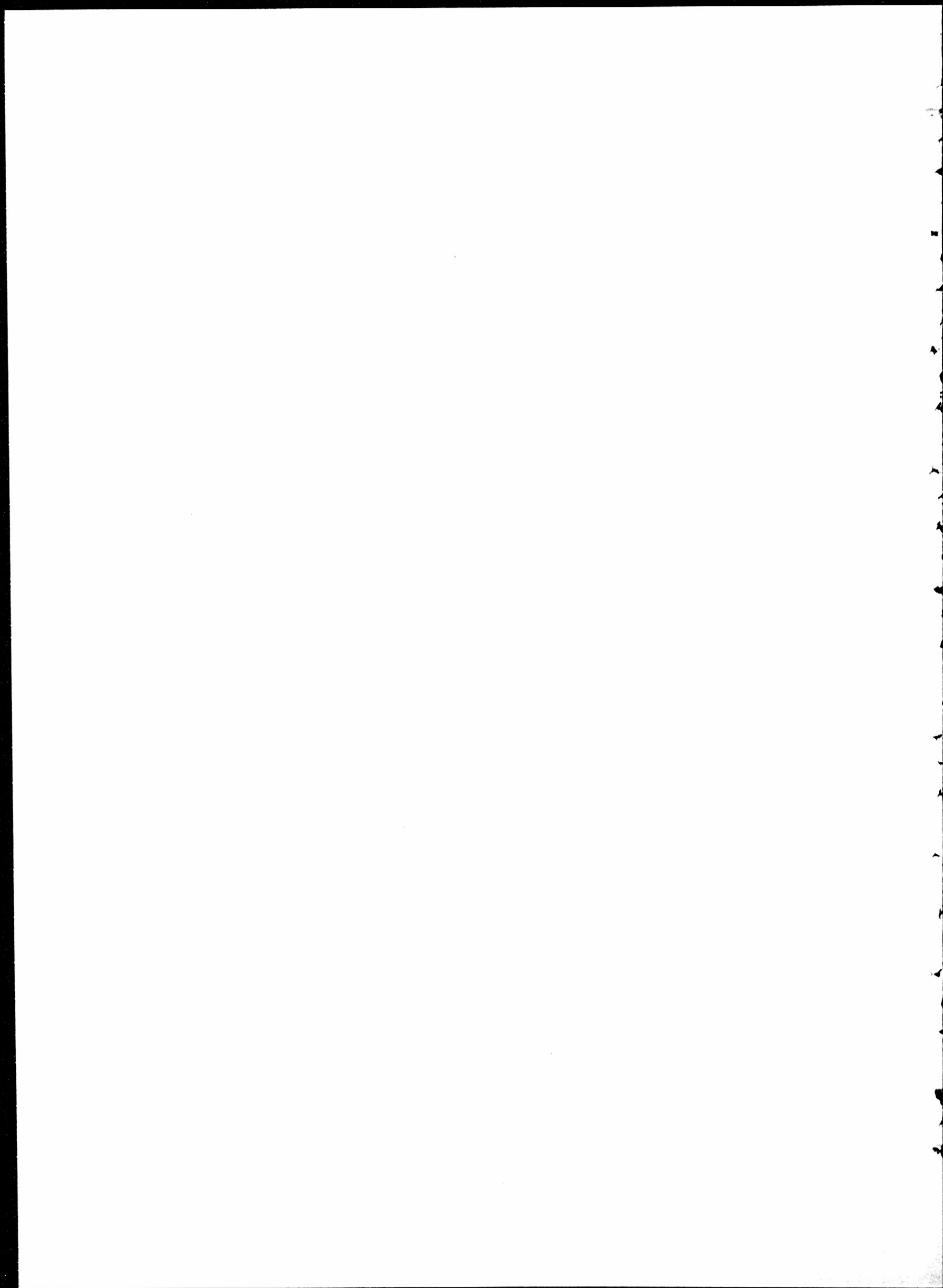
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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 16, 482

STANLEY COMPANY OF AMERICA, INC.,
and
EARLE RESTAURANT, INC.,

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WALTER N. TOBRINER,
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JOHN B. DUNCAN,
District of Columbia Commissioners,
and
J. J. ILGENFRITZ,

Appellees.

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED

JAN 12 1962

Joseph W. Stewart
CLERK

OPPOSITION TO PETITION FOR REHEARING

For the reasons set forth below respondents oppose the "Petition For Rehearing Before The Court En Banc Or, In The Alternative, For A Rehearing By The Same Division."

Substantially all that petitioners rely upon in support of their petition for rehearing was extensively briefed, strenuously urged during oral argument, and fully and correctly disposed of by this Court in its opinion rendered in the above-entitled cause on December 21, 1961.

Petitioners urge that, because of the location of a large office building at the southeast corner of Thirteenth and E Streets, Northwest and the location of Pulaski Park at the southwest corner thereof (J.A. 11, 12), it was error to hold that their property, situated as it is at the northeast corner of such intersection, fronts upon Pennsylvania Avenue.

In this connection, petitioners say that Pulaski Park is not specifically mentioned in the Shipstead-Luce Act, D. C. Code, 1961, §§ 410, 411, and must, therefore, be regarded as one of the "minor reservations" referred to in Senate Report No. 68, 71st Congress, 2d Session (J.A. 28, 29), where it was said of the proposed legislation:

* * * This measure, however, met with several objections. Probably the most important objection was that the authority of the commission would thereby be extended to govern structures adjacent to minor reservations. Such jurisdiction, it was contended, might tend to harrass unduly the owners of private property and expose them to unnecessary hardships.

While it is true that Pulaski Park is not mentioned in the Shipstead-Luce Act as one of the public areas to be protected, the portion of Pennsylvania Avenue between the Capitol and the White House is included, and it is for this reason that petitioners' property is subject to the provisions of the Act. This is crystal clear from the next paragraph of the Senate Report which reads:

As a consequence of these criticisms, the bill was redrawn to confine the control of the commission over property adjacent to certain specified locations, namely the Capitol Grounds, the White House Grounds, the portion of Pennsylvania Avenue from the Capitol to the White House, Rock Creek Park, the Zoological Park, the Rock Creek and Potomac Parkway, Potomac Park, the Mall Park system, and public buildings adjacent thereto. [Emphasis supplied.]

No other matter is now urged by petitioners as ground for rehearing which was not submitted to this Court during the original presentation of the case. Furthermore, there has been no intervening decision by this Court or by the Supreme Court of the United States which establishes a rule inconsistent with that upon which this Court based its decision of December 21, 1961.

For the foregoing reasons and others which are implicit in this Court's decision of December 21, 1961, it is respectfully submitted that the petition for rehearing should be denied.

CHESTER H. GRAY,
Corporation Counsel, D. C.

MILTON D. KORMAN,
Principal Assistant
Corporation Counsel, D. C.

HUBERT B. PAIR,
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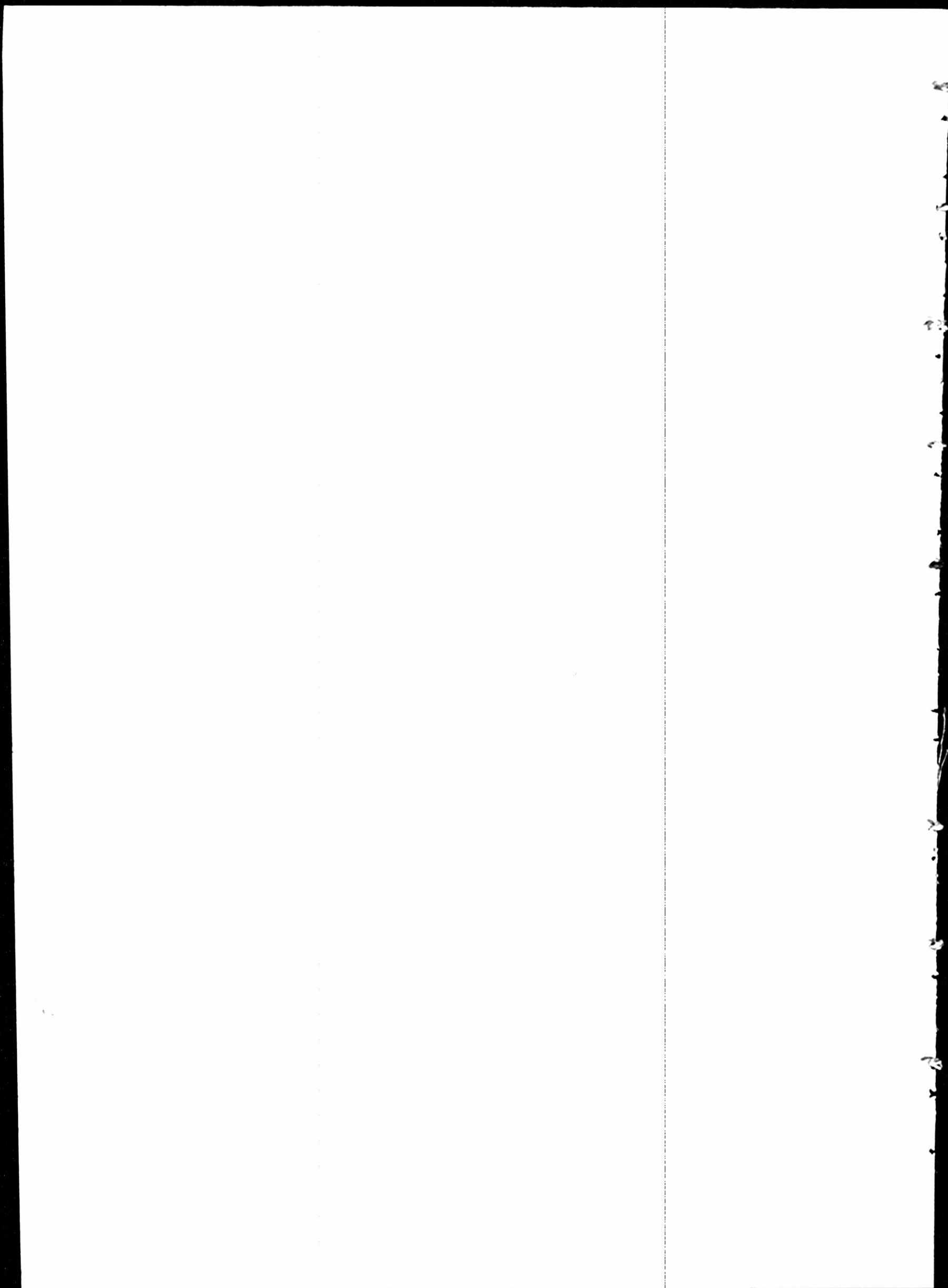
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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Opposition were mailed, postage prepaid, this 12th day of January, 1964, to Messrs. Douglas A. Clark and Louis Rabil, Attorneys for Appellants, 650 Warner Building, Washington 4, D. C.

JOHN R. HESS,
Assistant Corporation Counsel, D. C.



PETITION FOR REHEARING BEFORE THE COURT EN BANC
OR, IN THE ALTERNATIVE, FOR A REHEARING BY THE
SAME DIVISION

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,482

STANLEY COMPANY OF AMERICA, INC.,
a corporation,

and

EARLE RESTAURANT, INC.,
a corporation,

Appellants,

v.

WALTER N. TOBRINER,
FREDERICK J. CLARKE,
JOHN B. DUNCAN,
District of Columbia Commissioners,

and

J. J. ILGENFRITZ,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals

For the

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FILED JAN 4 1962

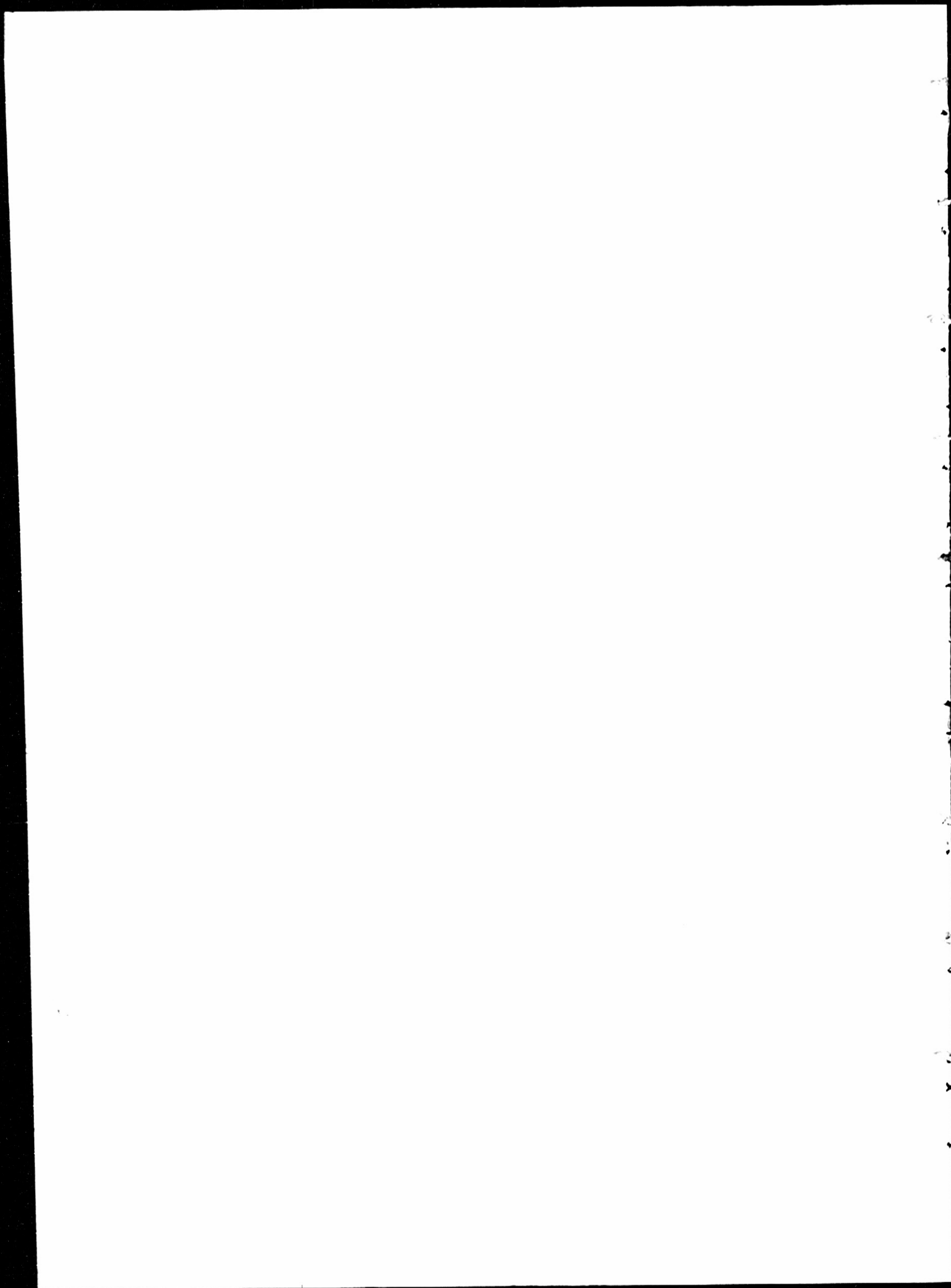
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UNITED STATES COURT OF APPEALS
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**PETITION FOR REHEARING BEFORE THE COURT EN BANC
OR, IN THE ALTERNATIVE, FOR A REHEARING BY THE
SAME DIVISION**

Come now Appellants, Stanley Company of America, Inc., and Earle Restaurant, Inc., and respectfully petition this Honorable Court to grant a Rehearing Before the Court En Banc or, in the Alternative, for a Rehearing by the Same Division.

QUESTION

The question involved in this Appeal is:

whether "any portion of" Appellants' property, located on the northeast corner of Thirteenth and "E" Streets, N. W., "fronts or abuts upon" Pennsylvania Avenue within the meaning of the Shipstead-Luce Act of May 16, 1930, 46 Stat. 366, 40 U.S.C., §121?

SUPPLEMENTAL STATEMENT OF FACTS

This Court has held, by a majority of two to one, that Appellants' building "fronts upon" Pennsylvania Avenue and is thus subject to the ruling of the Commissioners that its application for remodeling be subject to the approval of the Commission of Fine Arts.

Appellants' property is located on the northeast corner of the intersection of Thirteenth and "E" Streets, N. W. There are two pertinent sides. One side, the south side, is bounded by "E" Street, N. W., on the south. The other side, the west side, is bounded by Thirteenth Street, N. W., on the west. (J.A. 11, 12).

Appellants' building, at its closest point, is approximately two hundred and fifty feet (250) from Pennsylvania Avenue. (J.A. 11, 12; scale applies to full size plat in record).

Appellant's building is thus completely separated from Pennsylvania Avenue by a substantial amount of intervening property belonging to others. Across "E" Street to the south is a large office building standing squarely between Appellants' building and Pennsylvania Avenue. Directly across Thirteenth Street is another private building.

On the southwest corner of Thirteenth and "E" Streets begins Pulaski Park. It is a triangular shaped public park, bounded by "E" Street on the north, Thirteenth Street on the east, and Pennsylvania Avenue on the southwest.

GROUNDS

1. The decision of this Court, it is respectfully suggested, is contrary to the line of cases heretofore decided by this Court in which the words "fronts", "abuts", "frontage", and "front-foot" are generously used by the Court in precisely the same meaning advocated by Appellants. See Johnson v. Rudolph, 57 App. D.C. 29, 16 F(2d) 525, Crosby v. Moebs, 61 App. D.C. 42, 57 F(2d) 408; Philadelphia B & W RR v. Hazen, 116 F(2d) 543, 73 U.S. App. D.C. 37, (and the Supreme Court cases cited therein).

2. The decision of the Court ignores the plain meaning of the words used by Congress. This plain meaning is revealed by the exhaustive array of legal precedents cited in Appellants' Brief showing without exception that the words "fronting upon" have reference to the boundary line between the property involved and the street in question. Indeed, at the time of oral argument Appellees admitted, in response to a question by the Court, that they knew of no cases in support of their position. Appellees relied on a dictionary meaning: "to face: as the house fronts toward the east." !

The majority opinion, to support its interpretation of the words, quotes as follows from the Websters New International Dictionary, Second Edition, "to face or look forward; to have the front toward, . . . as the house fronts the street." The part omitted by the majority opinion reads: "opposite or over against." (Of course, the statute uses the intransitive).

The interpretation given by the majority opinion seems to be visibility (in some degree) plus proximity (in some degree).

It is submitted that there is no known rational usage of "to front upon", which is consistent with that adopted by the majority of the Court. Plainly, since Appellants' building fronts upon "E" Street and upon Thirteenth Street, it cannot be said to front upon Pennsylvania Avenue which is some distance away and separated completely from Appellants' building by other streets and other property.

Plainly one would not direct a taxicab driver to take him "to the Warner Building (Appellants' property) which fronts upon Pennsylvania Avenue, or is adjacent to Pennsylvania Avenue." Were we to do so we would never arrive at the Warner Building.

3. The majority opinion of the Court ignores the Legislative History of the Act as contained in Senate Report No. 68, 71st Congress, Second Session (J.A. 28, 29), which revealed a clear intention to keep the Act strictly limited and restrictive. Said the report:

"... This measure however, met with several objections. Probably the most important objection was that the authority of the Commission would thereby be extended to govern structures adjacent to minor reservations. Such jurisdiction it was contended, might tend to harass unduly the owners of private property and expose them to unnecessary hardships."

The report indicates that as a consequence of these criticisms the bill was redrawn limiting control of the Commission to certain specified locations.

The report stated:

"This bill, it will be seen, restrains the original proposal to the more important public areas."

Pulaski Park appears as Reservation 33 on J.A. 11, 12. Since it is not one of the parks specifically listed in the Act, it is undoubtedly one of those "minor reservations" referred to in the report.

Additionally, the majority opinion, in quoting the statute in question, fails to mention the several parks which were included in the Shipstead-Luce Act. The express inclusion of these parks in the Act would seem to exclude Pulaski Park, which is not mentioned in the Act. This, under the doctrine of expressio unis est exclusio alterius. The majority opinion seems to emphasize the position of Appellants' property in relation to Pulaski Park.

We note that the report above mentioned used the words "bordering" and "lined" when speaking of the property sought to be regulated.

4. The question involved in this case has a far reaching importance in the District of Columbia in view of the fact that effects of the Act permeate large areas throughout the city (J.A. 9, 10). Thus the rights of an untold number of property owners are involved.

5. The majority decision in sustaining the Lower Court amounts to sanction of the Commissioners' act in the taking of property or limiting its use without compensation. Under these circumstances Appellants pray for due and proper process. In the case at bar the process which is due is neither administrative nor judicial; it is parliamentary. Without clear and express legislative authority, it is submitted that no one has the right to regulate Appellants' property under this Act. (It is ironic that supporters of the bill represented to Congress that this law would be enforced lightly, etc. See Senate Report No. 68, 71st Congress, Second Session, in Record as Plaintiffs' Exhibit).

6. The Shipstead-Luce Act is a regulatory act. It authorizes the taking of property by the Commissioners without compensation. Congress by its express words intended the Act to be restrictive as to its application and cover only the property specified in the Act. This Act does deprive owners of free use of their property and it should, therefore, be strictly construed.

Under the majority opinion, where does the Commissioners' authority to take property end? The majority have not said. They say:

"... We do not mean to say that the area of the Commissioner's authority accordingly extends to all buildings that can be seen from the specified portion of the Avenue. The language of the Act does not permit this. But in determining whether a particular building fronts on the Avenue its actual location on the Avenue is not the sole test. We gain added support for this position by the language of the Act which refers to the necessity of

exercising a reasonable degree of control over the architecture of buildings 'adjacent' to public buildings and grounds of major importance . . ."

Appellants respectfully submit that the majority do not gain support for their position from the Act itself for the Act specifically defines the locations of buildings and properties to be regulated:

" . . . To this end, when application is made for permit for the erection or alteration of any building, any portion of which is to front or abut upon the grounds of the Capitol, the grounds of the White House, the portion of Pennsylvania Avenue extending from the Capitol to the White House, Lafayette Park, Rock Creek Park, the Zoological Park, the Rock Creek and Potomac Parkway, Potomac Park, the Mall Park System and public buildings adjacent thereto or abutting upon any street bordering any of the said grounds or parks . . ."

The majority also allow that if the Commissioners saw fit to prepare another map today, they could include all buildings on "F" Street, "G" Street, or another other street in the District of Columbia if the building is visible from Pennsylvania Avenue, and cite this decision in support of their action.

Under the majority opinion private property rights succumbed along with stare decisis. We do not believe that Congress intended to change the meaning of the words "fronts" and "abuts". We believe it intended their logical and long-used meanings just as they have been used by this Court and other Courts for years.

7. The majority opinion is based upon administrative interpretation, the Commissioners, Appellees, having drawn a plat which remained dormant, as far as Appellants' property is concerned, until Fall of 1959 when the permit to repair was rejected.

Appellants reply that the statute is not ambiguous. (Appellants' Brief, page 8, et seq.).

Appellants ask in deadly earnestness: Does an erroneous interpretation, long continued, accord to an agency a prescriptive right to continue to erroneously interpret?

The true answer, and indeed the only possible answer in a free society, is contained in the Dissenting Opinion of Circuit Judge Bastian:

"But it is also true that an incorrect interpretation cannot become lawful on the basis of its longevity."

8. In view of the divided opinion of this Court, Appellants respectfully, but earnestly, say that it would be in the interest of justice for this Honorable Court to grant a Rehearing by the full Court sitting En Banc. The Court's attention is respectfully called to page 8 of the Dissenting Opinion of Judge Bastian:

"If Congress intended the Act to embrace buildings visible from Pennsylvania Avenue, I do not think it startling to assume that it would have said as much; however, I do think it startling that the words 'to front or abut upon', words having a rather limited meaning in law, were deliberately chosen by Congress in codification of such an intention."

Respectfully submitted,

DOUGLAS A. CLARK

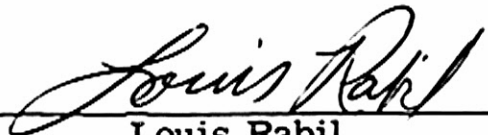

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Attorneys for Appellants.

CERTIFICATE OF GOOD FAITH

I HEREBY CERTIFY That the foregoing Petition for Rehearing Before the Court En Banc or, in the alternative, for a rehearing by the same division, is presented in good faith and not for delay.


Louis Rabil

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That a copy of the foregoing was ^{personally} delivered the ⁴th day of ^{January} ~~December~~, 196~~2~~, to Chester H. Gray, Esquire, Corporation Counsel, District Building, Washington 4, D. C.


Louis Rabil

